

No. 92-1625-CSX
Status: GRANTED

Title: International Union, United Mine Workers of America,
et al., Petitioners
v.
John L. Bagwell, et al.

Docketed:
April 8, 1993

Court: Supreme Court of Virginia

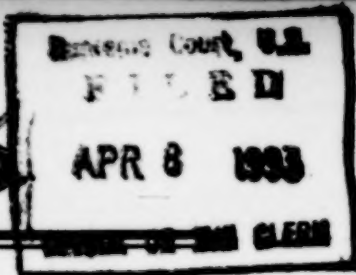
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Supreme Court of Virginia denied ptn for rehearing
1-8-93. 40 cps ea ptn & separate appdx.

Entry	Date	Note	Proceedings and Orders
1	Apr 8 1993	G	Petition for writ of certiorari filed.
2	Apr 8 1993		Appendix of petitioner filed.
3	May 6 1993		Brief of respondent John Bagwell in opposition filed.
4	May 12 1993		DISTRIBUTED. May 28, 1993
5	May 20 1993	X	Reply brief of petitioners filed.
6	Jun 1 1993		Petition GRANTED. *****
8	Jun 29 1993		Order extending time to file brief of petitioner on the merits until August 5, 1993.
9	Aug 3 1993		Record filed.
		*	Original record proceedings Circuit Court of Russell County, Virginia (5 BOXES)
10	Aug 4 1993		Order further extending time to file brief of petitioner on the merits until August 6, 1993.
11	Aug 6 1993		Joint appendix filed.
12	Aug 6 1993		Brief of petitioners International Union, et al. filed.
13	Aug 6 1993		Brief amicus curiae of Allied Educational Foundation filed.
16	Aug 13 1993		Record filed.
		*	Partial proceedings Supreme Court of Virginia (2 BOXES, 1 BLUE FOLDER)
21	Aug 17 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Aug 20 1993		Order extending time to file brief of respondent on the merits until September 22, 1993.
17	Sep 22 1993		Brief of respondent John L. Bagwell filed.
18	Sep 22 1993		Brief amicus curiae of United States filed.
22	Sep 28 1993		Brief amicus curiae of Center on National Labor Policy, Inc. filed.
23	Oct 12 1993		CIRCULATED.
24	Oct 12 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Oct 14 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 29, 1993. (1ST CASE).
26	Oct 26 1993	X	Reply brief of petitioners filed.
27	Nov 29 1993		ARGUED.

9 2-1625
No. 1625



IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
v. *Petitioners,*

JOHN L. BAGWELL; CLINCHFIELD COAL Co.; and
SEA "B" MINING Co.,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). See also *Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:

Whether—as the Virginia Supreme Court held below, and as is the growing trend in the lower courts—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders?

2. In *Gompers v. Buck's Stove & Range Co.*, *supra*, this Court—in passing on the claim that a civil contempt proceeding survived the settlement of the main civil case that generated the contempt proceeding—held that civil contempt proceedings, unlike criminal contempt proceedings, "necessarily end[] with the main cause": "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled." 221 U.S. at 451. Against this background, the second question presented here is:

(i)

Whether—as the Virginia Supreme Court held below, in agreement with one line of conflicting lower court decisions—a contempt proceeding may be treated as civil when it generates substantial non-compensatory contempt fines that survive the full settlement of the main civil case solely in order that the court is able to vindicate its own authority?

3. Whether the non-compensatory civil contempt fines of \$52 million at issue here—analogous to the punitive damages at issue in *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, and the civil forfeiture at issue in *Austin v. United States* No. 92-6073—were so excessive as to violate the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court of Virginia is reprinted in the separately bound Appendix ("App.") to this *certiorari* petition at App. 1a-20a and published at 244 Va. 463, 423 S.E.2d 349. The decision of the Court of Appeals of Virginia is reprinted at App. 25a-37a and published at 12 Va. App. 123, 402 S.E.2d 899. The decisions and orders of the Circuit Court of Russell County, Virginia, are reprinted at App. 39a-121a and are not published.

JURISDICTION

The Supreme Court of Virginia entered its decision on November 6, 1992, and denied petitioners' timely petition for rehearing on January 8, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution are reprinted in relevant part at App. 124a.

STATEMENT OF THE CASE

1. This action arises from a strike by the members of International Union, United Mine Workers of America, and United Mine Workers of America, District 28 ("the Union"). The strike was called against two affiliated coal companies, Clinchfield Coal Co. and Sea "B" Mining Co. (the "Company"), on April 4, 1989, to protest the Company's unfair labor practices. On April 12, 1989, the Company filed a bill of complaint against the Union in the Circuit Court of Russell County, Virginia, alleging various unlawful strike-related activities—including actions of interference and intimidation by strikers and their supporters directed against those engaged in the Company's operations—and seeking to have the court enjoin the Union from engaging in such activities. The next day, April 13, 1989, the court granted the injunction.

On April 21, 1989, the court, upon the Company's Motion to Amend the Temporary Injunction, modified

and strengthened its injunction. The court restrained and enjoined the Union, its officers, agents, servants, employees and members from engaging or attempting to engage in numerous broadly framed categories of acts. App. 114a-115a.

On May 16, 1989, on the motion of the Company, the court held its first contempt hearing. As was the case in every contempt hearing below, the proceeding was conducted as a civil proceeding tried to the judge who had issued the injunction, rather than as a criminal proceeding (subject to the applicable requirements of the United States Constitution) tried to a jury.

At the May 16 hearing, the trial court found that there had been 72 separate violations of its previously entered injunctions—including 15 instances of violence, 43 instances of exceeding picket numbers, 10 instances of blocking ingress and egress to the Company's facilities, and 4 instances of technical violations of the amended injunction, and therefore fined the Union \$440,000. App. 109a.

At this hearing, the court also established a prospective fine schedule for future violations. The schedule provided for fines of \$100,000 for each future incident involving any violence in violation of the injunction, and \$20,000 for each future incident not involving violence. In addition, these fines were to "double each day, without limitation." App. 111a.

On June 7, 1989, following another motion of the Company, the trial court held a second contempt hearing, found the Union in contempt, and imposed fines totalling \$2,465,000. App. 102a.

For three days, July 19-21, 1989, the trial court held a third contempt hearing at the motion of the company. The court entered a third contempt order on July 27, 1989, which fined the Union a total of \$4,465,000 (App. 97a), doing so despite admissions that the Company's own witnesses could not identify the individual or individuals accused of rock throwing and other acts. Indeed, the Company's own attorney conceded that the witness' testimony

was "kind of weak, not the strongest thing." Hearing Tr. (July 19, 1989), at 167.

On September 21, 1989, the trial court, at the motion of the Company, issued its fourth contempt order, imposing fines totalling \$16,900,000. In this order, the court empowered the Company's attorneys to collect all those fines imposed on or after July 27, 1989, *i.e.*, all fines except those issued pursuant to the first two contempt orders. App. 83a.

On October 9, 1989, the fifth contempt order was issued, at the motion of the Company, imposing fines of \$6,900,000. Specifically, the Union was held responsible for 71 separate counts of "violence" despite the fact that in 70 of these counts a perpetrator could not be identified.¹

The sixth, seventh, and eighth contempt orders were entered in November and December, 1989, at the motion of the Company, imposing fines in the amount of \$33,400,000.

As already noted, in all of these contempt proceedings, the contempts were treated as civil in nature, and the trial judge served as the sole trier of fact, while the Union was denied the various safeguards accorded to defendants in criminal contempt. In total, the trial court levied over \$64,000,000 in fines against the Union.

2. The Union timely noticed appeals of the first five orders to the Virginia Court of Appeals where they were consolidated. ("*Clinchfield I*"). While this appeal was pending, the Company and the Union continued to negotiate to resolve their labor dispute and, on January 1, 1990, announced a full settlement of their labor dispute

¹ Even where testimony consisted only of a witness having seen a pair of hands throwing a rock, the Union was fined \$100,000. App. 71a. In many instances, the Union was held responsible for actions on the sole basis that perpetrators were attired in camouflage clothing, which was treated as a striker "uniform." There are also cases where unidentified perpetrators were not so attired, and the Union was nonetheless held responsible and fined \$100,000 for each incident. *See generally, e.g.*, Hearing Tr. (Oct. 4, 1989) at 166-89, 243-54.

with the help of a "super mediator" appointed by the United States Secretary of Labor. The agreement also specifically provided that the parties would dismiss all pending litigation and would have vacated all outstanding civil judgments, including the contempt fines. Accordingly, on January 24, 1990, the Company and the Union jointly moved the trial court to dismiss the Company's cause and vacate all uncollected contempt fines.

On September 11, 1990, the trial court granted the parties' motion to dismiss the Company's civil cause against the Union. Additionally, the court dissolved the injunctions and vacated those fines payable to the Company. However, the trial court refused to vacate the remaining \$52,000,000 in fines and—in light of the dismissal of the underlying civil cause and the Company's motion to vacate the pending contempt fines—the court appointed John L. Bagwell as a special commissioner charged with defending and collecting those fines.

Shortly thereafter, Bagwell moved to intervene in *Clinchfield I*.

3. Following the September 11 decision of the trial court, the Union filed a second appeal seeking reversal of, *inter alia*, the sixth, seventh and eighth contempt orders, the order granting in part and denying in part the joint motion to vacate and dismiss, and the order substituting Bagwell as special commissioner. ("*Clinchfield II*").

4. In an opinion and order dated March 26, 1991, the Virginia Court of Appeals decided *Clinchfield I*. The decision denied Bagwell's right to intervene and ordered that the fines imposed against the Union under the first five contempt orders be vacated. App. 34a-37a. The court of appeals, choosing to apply state law—and noting that, on its understanding, the state law parallels the applicable federal law—held that, even if the fines at issue were civil in nature, "civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines." App. 36a.

5. Following this decision by the Virginia Court of Appeals, Bagwell, despite the denial of his request for party status, petitioned for appeal to the Supreme Court of Virginia. Specifically, Bagwell sought to appeal the denial of his petition to intervene and the vacation of the fines in light of the parties' settlement. The Union opposed the appeal and moved to dismiss. The Virginia Supreme Court deferred consideration of these motions.

On March 5, 1992, the Virginia Supreme Court granted Bagwell an appeal in *Clinchfield I*. At the same time, that court certified *Clinchfield II*, which had been fully briefed and argued and was pending appeal in the Virginia Court of Appeals. The two cases were then treated as consolidated.

In a decision dated November 6, 1992, the Virginia Supreme Court noted that the Union had appealed the underlying contempt orders, "contend[ing] that the fines are criminal in character and, therefore, are invalid because they were imposed without the mandated constitutional protections." App. 12a. That court rejected that contention holding that the fines at issue were not criminal in nature, but rather were civil in nature. App. 15a-16a.

The Virginia Supreme Court also rejected the Union's argument that under federal and state law these fines, if civil, must be vacated as a consequence of the full settlement of all disputes between the parties, explaining that "[c]ourts of the Commonwealth must have the authority to enforce their orders by employing coercive civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained." App. 17a. That court also granted party status to Bagwell so he could "uphold the validity of the subject fines." App. 11a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

A. "Criminal contempt is a crime in the ordinary sense" and "in every fundamental respect." *Bloom v. Illinois*, 391 U.S. 194, 201 (1988). State criminal con-

tempt proceedings must therefore meet the requirements that the Constitution demands for the trial and punishment of crimes, not simply those requirements demanded for the adjudication of civil matters. *Id.* at 201-208 (collecting cases). That being so, a state may not deny a defendant those protections by characterizing as a civil contempt proceeding that which in truth is a criminal contempt proceeding. The instant case presents two questions that are fundamental to the proper characterization of contempt proceedings as civil or criminal in nature.

First, whether a contempt proceeding may be treated as civil in nature—so that none of the constitutional requirements for a criminal contempt proceeding need be followed—where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders.

Second, whether a contempt proceeding may be treated as civil when it generates substantial non-compensatory contempt fines that survive the full settlement of the main civil case solely in order that the court is able to vindicate its own authority.

The Virginia Supreme Court answered those questions “yes.” Those answers are contrary to those “principles . . . settled at least in their broad outlines for many decades” that this Court has established to answer the threshold “question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature, for the purposes of applying the Due Process Clause and other provisions of the Constitution.” *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The *Hicks* Court located those “principles” in the leading case of *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 441 (1911), and observed that for the ensuing 77 years

this “Court has consistently applied these principles.” 485 U.S. at 631-632.

Nonetheless—as the Virginia Supreme Court’s decision here and the decisions of other courts cited therein show—the *lower courts* are going their own quite different way, as if *Gompers* and *Hicks* had never been decided. The result is that the lower courts are treating contempt proceedings that, under the *Gompers* principles, are *criminal* contempt proceedings as *civil* contempt proceedings, to be tried as civil cases rather than criminal cases, without the constitutionally required criminal procedures. While the decision below is singular in its disdain for *Gompers* and *Hicks* as constitutional precedents of binding force, and in the thoroughness with which it does away with criminal contempt proceedings as a class in the Virginia courts, it is otherwise indicative of the dominant trend that is currently running in the lower courts.

This is neither the time nor the place to mince words; those lower court decisions, by making the full force of what have heretofore been deemed to be criminal penalties freely available in civil contempt, create an open season on criminal contempt. Given the wants and needs of claimants and of trial judges, as experience reveals those wants and needs, there is every reason to believe that decisions, like the one below, will in no time make criminal contempt proceedings—and their attendant constitutional requirements—as scarce in the legal world as the California Condor is in the Western sky.

If the test that this Court has determined to be “sound in principle” and “generally” applicable, *Gompers, supra*, 221 U.S. at 443, for safeguarding the constitutional requirements implicated by the contempt power is to be reconsidered, it is for *this Court* to undertake that reconsideration for itself, not for the lower courts to presume to make such a reconsideration on the Court’s behalf.

The particulars of this case make it plain that much rides on the maintenance of a proper line of demarcation between criminal contempt and civil contempt. This “civil” contempt proceeding has generated 8 sets of adju-

dications of complex factual questions in which the defendant union was *denied* the constitutional requisites for the trial of a criminal case. The resultant "civil" fines total \$52,000,000. Those fines are being pursued even though the parties to the main civil case that generated this "ancillary civil contempt proceeding" have settled their lawsuit and have jointly moved that the Virginia courts vacate all contempt fines as an integral component of that overall settlement. It is difficult to conjure up a larger departure from the constitutional norms declared by this Court, or one that carries with it a larger financial penalty or more long-lived effects.

For all these reasons, this *certiorari* petition should be granted.

B. In addition to—and conceptually quite separate from—the foregoing questions, this case presents a question all but identical to the question presented in *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992), and to the question presented in *Austin v. United States*, No. 92-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993).

TXO Production—which arises in the context of a punitive damages award in a tort case—and *Austin*—which arises in the context of a civil forfeiture proceeding—ask the Court to decide whether either the Due Process Clause or the Excessive Fines Clause limit non-compensatory civil monetary penalties. For purposes of this constitutional analysis, we submit that there is no viable distinction between non-compensatory civil contempt fines, punitive damages and civil forfeitures. And, by any measure, the \$52,000,000 fine here raises at least as substantial questions of compliance with the Due Process Clause and Excessive Fines Clause as the punitive damages award in *TXO Production* or the civil forfeiture order in *Austin*.

Thus, whatever else may happen, Question 3 of this petition should be held for consideration in light of this Court's decisions in *TXO Production* and *Austin*.

I. THE ISSUES CONCERNING THE CONSTITUTIONAL DISTINCTION BETWEEN CIVIL CONTEMPT AND CRIMINAL CONTEMPT

A. The Applicable Constitutional Considerations

It is helpful, we believe, before moving to a consideration of the applicable black letter rules, to return to *Bloom v. Illinois*, *supra*, and its discussion of the competing considerations that have served to mold those rules.

First of all, "the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates". *Bloom*, *supra*, 391 U.S. at 201. Given that identity, the path of the law has been to apply the full panoply of the Constitution's criminal law requirements to the prosecution of criminal contempts. Indeed, the *Bloom* Court recognized that the circumstances of criminal contempt present an additional and particularly "compelling argument" for applying the Constitution's "protection against the arbitrary exercise of official power": "Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament"; the contempt power, in other words, "is an 'arbitrary' power which is 'liable to abuse.'" 391 U.S. at 202.

Bloom recognized that, despite these considerations, there is a school of thought that an untrammelled civil contempt power is "necessary to preserve the dignity, independence, and effectiveness of the judicial process," and that the constitutional requirements for the trial and punishment of crimes, when applied to contempt proceedings, undermine paramount "consideration[s] of efficiency" and of "the desirability of vindicating the authority of the court." 391 U.S. at 208. The *Bloom* Court firmly rejected that conception:

We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of

all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries. [391 U.S. at 208.]

Nonetheless, with the fewest of exceptions, the lower courts continue to be moved by a felt-need to augment their coercive powers by broadening the realm of civil contempt and by narrowing that of criminal contempt. In the following pages, we detail the nature and extent of that growing resistance to the law as this Court has declared it, together with the conflicting lower court decisions that faithfully implement *Gompers* and *Hicks*. As we show, the dominant trend in the lower courts cannot be squared with a sound respect for this Court's precedents or for the constitutional provisions on which those precedents rest.

B. The Mandatory/Prohibitory Dichotomy

1. In *Gompers v. Buck's Stove & Range Co.*, *supra*, this Court declared that the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added).

The Court explained the basis for this line of demarcation as follows:

[I]mprisonment for civil contempt is ordered where *the defendant has refused to do an affirmative act* required by the provisions of an order which, either in form or substance, was mandatory in its character.²

² The *Gompers* Court gave as "examples":

If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a

. . . . The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.

On the other hand, if the defendant *does that which he has been commanded not to do*, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. [221 U.S. at 442-43 (citations omitted).]

Then, in *Hicks v. Feiock*, *supra*, where contempt fines were at issue, the Court reaffirmed this approach:

If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine *simply by performing the affirmative act required by the court's order*. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings [485 U.S. at 632 (emphasis added).]

In sum, civil contempt concerns a party who is subject to a court order *to perform discrete affirmative acts* within a discrete time period specified therein, and the contempt order is to coerce the party to do the act required. *See Gompers*, *supra*, 221 U.S. at 442.

In contrast, criminal contempt concerns a party who has *engaged in one or more completed acts that constitute a violation of a court order prohibiting those acts*, with the contempt order imposing a punishment on that party for having engaged in those completed prohibited acts. And, that characterization obtains whether

conveyance required by a decree for specific performance, he could be committed until he complied with the order. [221 U.S. at 442.]

the court is moved by an intent to punish the defendant for violating that order pure and simple, or by an intent to do so in order to coerce the defendant not to engage in repeat violations *in the future*. See *Hicks, supra*, 485 U.S. at 635-36.

2. It should be enough that for 80 years this Court has proceeded on the basis that the mandatory/prohibitory dichotomy is sound in principle and generally states the test that assures against the category of civil contempt and the category of criminal contempt collapsing into each other. But given the stubborn refusal of the lower courts to accept the law as stated in *Gompers* and reaffirmed in *Hicks*, it is the course of prudence to add a few words of elucidation on this dichotomy.

As this Court has recognized, both civil contempt sanctions and criminal contempt sanctions have a "coercive" effect in the general sense of that term. With regard to civil contempt sanctions, the "coercive" effect is, of course, a given. And, with regard to criminal contempt sanctions, there is a "coercive" effect in that those sanctions "tend[] to prevent a repetition of the disobedience." *Hicks, supra*, 485 U.S. at 635-36 (quoting *Gompers, supra*, 221 U.S. at 443). Thus, for the purpose of distinguishing civil contempt and criminal contempt, the term "coercive"—when used in contrast to "punitive"—must have some content beyond "tend[ing] to prevent a repetition of the disobedience." *Id.* The mandatory/prohibitory dichotomy provides that content.

If a judge threatens to impose sanctions for a possible future violation of a prohibitory order, the threatened sanctions "coerce" compliance in the same sense—and only in the same sense—that all legal rules with stated penalties coerce compliance: *viz.*, the coercion takes the form of deterring wrongful acts by defining those acts as wrongful and by threatening punishment for future wrongful acts that may take place. In such circumstances, the only sense in which a party controls his destiny—*viz.* "carries the keys of his prison in his own pocket," *In re*

Nevitt, 117 Fed. 448, 451 (8th Cir. 1902)—is the sense in which each member of the general public carries the keys to prison in his own pocket each day of his life: *viz.*, in the sense that each of us is free as long as we do not violate the criminal law.

The coercive threat of sanctions that back up a *mandatory order* is *qualitatively different*. Such a threat leaves the criminal law's area of general deterrence against possible wrongful acts and enters the area of requiring certain specified forms of action.³ Precisely because this is so, the mandatory/prohibitory dichotomy is the only doctrinal safeguard against the judicial creation of a body of *civil* law that incorporates the criminal law's norms and sanctions while dispensing with the Constitution's requirements for the prosecution and punishment of crimes. Almost without exception, the criminal law consists of prohibitions against "wrongful" action that is to be eschewed (rather than specifications of actions that must be taken) coupled with penalties (imprisonment, fines, or forfeitures) for violations of these prohibitions.

Very simply stated, a contempt proceeding that imposes fines or imprisonment on a party for that party's violation of a previously issued prohibitory injunction is nothing but a *private civil substitute* for what has always been regarded as a *criminal* proceeding covered by the *Constitution's* requirements for such proceedings. Given the significant protection the Constitution provides to a defendant in a criminal proceeding, if civil plaintiffs and trial courts may use a simple and certain means for securing all the benefits of criminal punishments that dispenses with the necessity of a criminal proceeding, there is every reason to believe that they will take advantage of the opportunity thus presented. It is the office of

³ Thus, the distinction between mandatory and prohibitory judicial decrees in the contempt context mirrors the familiar distinction between acts and omissions. See *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 196 (1989).

the mandatory/prohibitory dichotomy to prevent just such an erosion of the distinction between civil contempts and criminal contempts.

3. Although much of the lower court law in the contempt context is an effort to avoid the teachings of *Gompers* and *Hicks*, a lucid and persuasive counter-example is *In re Contempt of Dougherty*, 429 Mich. 81, 413 N.W.2d 392 (Mich. 1987).⁴ In *Dougherty* the Michigan Supreme Court explained that:

What is apparent from [the Supreme Court] cases is that a coercive sanction is proper where the contemnor, at the time of the contempt hearing, is under a present duty to comply with the order and is in *present violation* of the order.

* * * *

[W]here there is only a past duty to obey the court order, or a present duty, but only a past violation of the order, a coercive sanction is not permissible. It is not a proper sanction because there is nothing to coerce. In fact, defendant is, at the time of the hearing, either in actual compliance with the order, or under no present duty to comply. . . . [429 Mich. at 99-100, 413 N.W.2d at 399 (emphasis in original).]

The Michigan court then determined that "there was no *act* that could be coerced that would put defendants into compliance with the injunction," and therefore that "the only appropriate sanction for their contemptuous behavior is criminal, after an appropriate criminal proceeding, or a civil order of compensation indemnifying plaintiff for any actual damage or loss it sustained." 429 Mich. at 102, 413 N.W.2d at 400 (emphasis added).

4. The Virginia Supreme Court's decision here is in a different universe of discourse. The court below gave

⁴ There, a trial judge found several individuals in civil contempt for twice violating an injunction ordering them not to trespass on, and not to obstruct the entrances to, the grounds of a plant in which cruise missile engines were manufactured. After the Michigan Court of Appeals affirmed, the Supreme Court of Michigan reversed.

the back of its hand to the mandatory/prohibitory dichotomy in two sentences. Neither of its rationalizations for so doing is at all persuasive:

First, the Virginia court opined that the mandatory/prohibitory dichotomy "presents a distinction without a difference." App. 15a.

It is our understanding, however, that it is most emphatically *not* the province of state courts of last resort to reject this Court's teachings with respect to the Federal Constitution's requirements.

Second, the Virginia court relied on a line of cases suggesting that this Court's decision in *United States v. United Mine Workers*, 330 U.S. 258 (1947), rejects the mandatory/prohibitory dichotomy set out in *Gompers* and thereby robs *Gompers* of all vitality.

It is sufficient that this Court does not so understand *Mine Workers*. *Hicks* postdates *Mine Workers* and restates and reaffirms the mandatory/prohibitory dichotomy set forth in *Gompers*. See, *supra*, at p. 11. And *Hicks* does so without betraying the slightest concern that *Mine Workers* can fairly be treated as a conflicting precedent.⁵

⁵ It is hardly surprising that *Hicks* does not understand *Mine Workers* to conflict with *Gompers*, for this Court's opinion in *Mine Workers* rests on and applies the mandatory/prohibitory dichotomy set out in *Gompers*. At the time the coercive civil contempt fines at issue in *Mine Workers* were imposed, the United Mine Workers was in violation of a trial court's orders requiring the Union to take certain steps toward bringing about the cessation of an unlawful strike. This Court read that order as imposing on the Union the obligation to take the following discrete, affirmative acts the doing of which would avoid the imposition of the fines:

[a] by withdrawing unconditionally the notice given by it, signed John L. Lewis, President, on November 15, 1946, to J.A. Krug, Secretary of the Interior, terminating the Krug-Lewis agreement as of twelve o'clock midnight, Wednesday, November 20, 1946, and [b] by notifying, at the same time, its members of such withdrawal in substantially the same manner as the members of the defendant union were notified of the notice to the Secretary of the Interior above-mentioned; and [c] by withdrawing and similarly instructing the members

5. For the reasons just given, we submit that *Gompers* and *Hicks* establish a mandatory/prohibitory dichotomy in the terms set out above. Be that as it may, it is even plainer that this Court's decisions cannot be read as permitting a test for determining whether a contempt proceeding is civil or criminal that disregards the nature of the underlying judicial decree. *See supra*, at pp. 10-11, quoting and discussing *Gompers, supra*, 221 U.S. at 443, and *Hicks, supra*, 485 U.S. at 632. Yet, as the decision of the Virginia Supreme Court shows, the lower courts are dispensing with the part of the *Gompers-Hicks* inquiry devoted to whether the underlying decree at issue is mandatory or prohibitory, offering as justification that the mandatory/prohibitory dichotomy "was not intended to be a dispositive test," *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1343 n.27 (3d Cir. 1976), or that it is "of little utility," *Shakman v. Democratic Organization*, 533 F.2d 344, 349 n.7 (7th Cir. 1976).

Those courts confine themselves to a surface inquiry in which only the *form* of the *contempt order itself* is examined: If that order is entered prior to a party's violation of a court's decree and is stated in a conditional form—*viz.*, is stated as "*if a defendant does or fails to do a certain act, then the following sanction will be imposed*"—the order is deemed to fall within the area covered by civil contempt. In contrast, if the contempt order is entered after the fact and sets a fine or imprisonment for the violation, the order falls within the area covered by criminal contempt.

of the defendant union of the withdrawal of any other notice to the effect that the Krug-Lewis agreement is not in full force and effect until the final determination of the basic issues arising under the said agreement. [330 U.S. at 305.]

Thus, this Court made clear that the United Mine Workers and its officers were not subject to a broad prohibitory order—*e.g.*, do not strike—but rather to a mandatory order requiring that the Union and its officers undertake to perform certain discrete, affirmative acts in order to purge themselves of civil contempt.

A line of recent cases arising out of anti-abortion demonstrations is illustrative. For example, in *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991), the trial judge enjoined the defendants and any person acting in concert with the defendants "from blocking access to abortion facilities and other activities in the state," and "provided for sanctions of \$500 for each prospective violation of the order," *id.* at 531. Defendants violated this order, and the trial judge held them in civil contempt.

On appeal, the Ninth Circuit acknowledged this Court's instruction in *Hicks* that a contempt fine is civil "when the defendant can avoid paying the fine simply by performing the . . . *act required by the court's order*," 929 F.2d at 532 (emphasis added). But the Ninth Circuit determined that defendants had "committed the *act* that subjected them to contempt by *failing to comply with the court's prospective order*," *id.* at 532, and thus held that the trial judge had properly proceeded in civil contempt, *id.* Such verbal sleight of hand—through which a failure-to-comply with a prohibition is somehow transmuted into the failure to do an affirmative act commanded—empties the mandatory/prohibitory dichotomy of meaning and robs the *Gompers* test of its content.

Other lower court decisions have adopted the same strategem. *See, e.g., Roe v. Operation Rescue*, 919 F.2d 857, 869 (3d Cir. 1990) (trial judge appropriately enforced a prohibitory order in civil contempt because "the contemnors' obligation to pay these fines was contingent on a future violation of its orders"); *N.Y. State National Organization for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (trial judge appropriately enforced a prohibitory order in civil contempt because "[t]he prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights"); *Lovejoy Specialty Hosp. v. Advocates for*

Life, Inc., 802 P.2d 684 (Or. App. 1990), *pet. rev. dismissed as moot*, 814 P.2d 511 (Or. 1991) (same).⁶

In practical terms, this burgeoning rule—that, even where a prohibitory decree is being enforced, the contempt is civil if the surface form of the order imposing contempt sanctions is conditional—shrinks criminal contempt to the verge of invisibility. To avoid the inconvenience of meeting the Constitution's requirements for criminal cases, all that a judge need do is announce in advance that, if his decree is violated, he will impose a fine or a jail sentence. Doing so transforms all sanctions imposed for any subsequent disobedience into civil contempt sanctions. The lower courts' creation of this rule—which trivializes this Court's precedents and the important constitutional interests these precedents implement—calls for for this Court's review.

⁶ Some lower courts that have refused to follow *Gompers* and *Hicks* have also followed slightly different strategems.

First, some courts that disregard the mandatory/prohibitory dichotomy state the test to be whether the trial judge's true purpose in imposing contempt sanctions was primarily to coerce or to punish. The Virginia Supreme Court relied heavily on the trial judge's own statements of his purpose in imposing contempt fines. See, e.g., App. 13a-15a (quoting trial judge's explanation of reasons for the imposition of the contempt fines and relying on "the trial court's clear intent"). See also, e.g., *Latrobe Steel Co.*, *supra*, 545 F.2d at 1344 & n.41; *Shakman*, *supra*, 533 F.2d at 349-50.

But this negation of mandatory/prohibitory dichotomy is as contrary to *Gompers* and *Hicks* as its formalistic counterpart. In *Hicks*, this Court condemned just such an inquiry into a judge's subjective purpose in imposing contempt sanctions: "Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided." 485 U.S. at 635.

Second, other courts reach results that cannot be squared with *Gompers* and *Hicks* through opinions that do not make clear the basis for their divergence. E.g., *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976); *NLRB v. Truck Drivers & Helpers*, 450 F.2d 413 (3d Cir. 1971); *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411 (Vt. 1992); *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655 (1953); *People*

C. The Continued, Public Prosecution of "Civil" Contempt Orders After The Final Settlement Of The Main Civil Action

The contempt fines at issue come out of contempt proceedings that were instituted at the motion, and for the benefit, of private civil complainants; these proceedings were styled civil proceedings ancillary to the main civil action. Nevertheless, the trial court and the Virginia Supreme Court refused to allow the private civil parties, by joint motion, to terminate the contempt proceedings and to vacate the contempt fines. Instead, the trial court responded to that motion by appointing a special commissioner and charging him with defending the contempt judgments on appeal and instituting all further actions necessary to collect the accumulated contempt fines.

The Virginia Supreme Court affirmed these trial court orders, reasoning that regardless of the wishes or interests of the private civil parties who initially sought contempt, "[c]ourts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained." App. 17a.

In this regard, as in the regard addressed in part B above, the decision below conflicts with this Court's *Gompers* decision and with *Gompers*' progeny. And, once again, in this regard the decision illustrates a growing trend of decisions that, misconstruing or ignoring *Gompers*, extends civil contempt deep into the area covered by criminal contempt.

1.(a) *Gompers* involved a challenge to a contempt order that imposed a term of imprisonment and a monetary obligation on a group of labor leaders at the motion of a company that had brought a civil action against those leaders and their labor organization for conducting an unlawful labor boycott. The company had obtained an injunction against the boycott, the labor leaders had violated the injunction, and the company sought relief

v. Batey, 228 Cal. Rptr. 787 (Cal. App. 1986), *cert. denied*, 480 U.S. 932 (1987).

through civil contempt for such violations. After the trial court held defendants in contempt and determined the proper contempt penalties, but before the penalties were actually enforced, the parties in *Gompers*—like the parties here—reached a full settlement of all disputes and all litigation between them.

On the basis of that settlement, and in light of the nature of civil contempt, the *Gompers* Court held that: “When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled.” 221 U.S. at 451 (emphasis added). Any proceeding to enforce previously imposed civil contempt penalties thus “necessarily ended with the settlement of the main cause of which it is a part.” *Id.* at 452.

The *Gompers* Court could not have been more plain that the interest in the vindication of the trial court’s authority *cannot* justify the continued enforcement of civil contempt after settlement of the main case. Rather, vindication of that interest is the province of *criminal contempt*, which the Court contrasted with civil contempt in the following way: “If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.” 221 U.S. at 451 (internal citations omitted).⁷

⁷ Consistent with all of the foregoing, in *Leman v. Krentler-Arnold Hinge Last Company*, 284 U.S. 448 (1932), this Court explained *Gompers* as follows:

The question of the relation of [a civil contempt] proceeding to the main suit was fully considered in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, and it was determined that the [civil contempt] proceeding was not to be regarded as an independent one, but as a part of the original cause. . . . The distinction was made in this respect between such proceedings and those at law for criminal contempt which “are between the public and the defendant, and are not a part of the original cause.” In the *Gompers* Case . . . as there had been a complete settlement of all matters involved in the equity

We are aware of no decision in this Court in the years since *Gompers* that has in any way called this aspect of *Gompers* into question.

(b) The decision below, which clothes civil contempt orders with the precise attribute *Gompers* holds is unique to criminal contempt orders—*viz.*, the capacity to survive a full private settlement—is clearly contrary to *Gompers*. The entirety of the Virginia Supreme Court’s effort to distinguish *Gompers* in this regard is that court’s brief assertion that the monetary relief at issue in *Gompers* was “compensatory relief to be paid to the complainant,” so that *Gompers* did not involve “coercive, civil contempt sanctions.” App. 18a.

The *Gompers* opinion, however, does not even hint that a distinction between different kinds of civil contempts should make a difference regarding the ability of the parties to settle their dispute. To the contrary, *Gompers* rests its conclusion regarding the effect of settlement on the proposition that civil contempt—as distinct from criminal contempt—is a “remedial” proceeding, “for the benefit of the complainant,” and *not* a proceeding “to vindicate the authority of the court”:

It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, *and for the benefit of the complainant*. But if it is for criminal contempt the sentence is punitive, *to vindicate the authority of the court*. [221 U.S. at 441 (emphasis added).]

And, the *Gompers* Court made it quite clear that this distinction obtains where the civil contempt order can be termed “coercive” and where it can be termed “compensatory.” Such a “coercive” civil contempt order is “not inflicted as a punishment, but is intended to be remedial by

suit, the contempt proceeding was necessarily ended. . . . [284 U.S. at 452-53.]

See also *United States v. United Mine Workers*, *supra*, 330 U.S. at 295 n.61 (1947).

coercing the defendant to do what he had refused to do" and thereby benefiting the civil complainant. 221 U.S. at 442.⁸

Once again, this Court has never questioned this aspect of *Gompers*.⁹

(c) The conflict between the decision below and *Gompers* is vividly illustrated by the decisions of the trial court to appoint a special commissioner and to charge him with further prosecution of the contempt fines here at issue, and by the decision of the Virginia Supreme Court to affirm those trial court decisions and to grant that court-appointed officer party status.

Gompers explained that a civil contempt proceeding—as a proceeding that serves “remedial [ends] . . . for the benefit of the complainant”—is “instituted, entitled, tried, and up to the moment of sentence, treated as a part of the original cause in equity.” 221 U.S. at 445. In such a proceeding, the civil complainant is “not only the nominal, but the actual, party on the one side, with the defendants on the other”; the civil complainant is acting “in its own right in an equity cause, and not as a representative of the [government] prosecuting a case of criminal contempt.” *Id.*

In contrast, a criminal contempt proceeding—as a proceeding designed “to vindicate the authority of the court”—is normally “a separate action, one personal to the defendants, with the defendants on one side and the court

⁸ See also *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599, 604-605 (1907); *Bessette v. W. B. Conkley*, 194 U.S. 324, 328 (1904); *In re Nevitt*, *supra*, 117 Fed. at 458-59.

⁹ See *Shillitani v. United States*, 384 U.S. 364, 368 (1966) (civil contempt “is essentially a civil remedy designed for the benefit of other parties”); *Penfield v. SEC*, 330 U.S. 585, 590 (1947) (citing *Gompers* for proposition that punishment for civil contempt, “is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public”); *McCrone v. United States*, 307 U.S. 61, 64 (1939) (same); see also *Hicks*, *supra*, 458 U.S. at 63 (citing *Gompers*).

vindicating its authority on the other.” 221 U.S. at 442 (quoting the lower court’s *Gompers* decision).

The criminal nature of the proceedings at issue here is thus amply demonstrated by the fact that the courts below, finding the normal structure of civil litigation inadequate to their purposes, created a new structure that, in its essence, follows the criminal contempt model. Because the civil complainants had no continuing interest in enforcing the fines, the trial court took from them their right to control prosecution of their litigation, appointing a special commissioner to prosecute the contempt fines, all to vindicate *the court’s* interests.¹⁰

2. The decision below is in conflict with numerous lower court decisions involving settlement agreements.

(a) For example, the Wisconsin Supreme Court, in an opinion containing an extensive quotation and discussion of *Gompers*, concluded:

Usually a contempt action which seeks to vindicate the authority and dignity of the court is a criminal contempt, while a contempt which seeks to enforce a private right of one of the parties in an action is a civil contempt. The distinction is often expressed in the results which flow from the particular finding of contempt. If the order is coercive or remedial, the contempt is civil. If the order is purely punitive, the contempt is criminal. . . . In *Gompers*, the United

¹⁰ Such an arrangement, although styled a part of the initial litigation is, in its substance, a separate piece of litigation. The arrangement certainly does not correspond to the normal structure of civil proceedings. See *Webster Eisenlohr v. Kalodner*, 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) (courts may not generally appoint special masters in a civil case to pursue goals beyond those that the parties choose to litigate). Rather, it follows what *Gompers* described as the normal structure of criminal contempt proceedings: *viz.*, “a separate action . . . with the defendants on one side and the court vindicating its authority on the other.” *Gompers*, *supra*, 221 U.S. at 442. See also *Young v. Vuitton*, 481 U.S. 787 (1987) (a court may exercise criminal contempt authority by appointing a special prosecutor to prosecute one of the civil parties for criminal contempt).

States Supreme Court held that settlement of the underlying controversy required dismissal of civil contempt grounded in that controversy. Thus, under this rule, civil contempt begun before or, as here, after the settlement of the underlying dispute, is moot because it cannot achieve a coercive or remedial effect. [*State v. King*, 82 Wis. 2d 124, 262 N.W. 2d 80, 82, 84 (1978) (internal citations omitted).]¹¹

(b) The decision below also conflicts with another line of federal cases, which has followed *Gompers'* reasoning outside the context of settlement agreements. These cases stand for two propositions that cannot be squared with the decision below: *first*, that civil contempt proceedings and orders must terminate if the civil complainant *for any reason* (whether due to settlement or otherwise) becomes disentitled to the benefits of the contempt proceedings that the complainant has instituted; and, *second*, that in such circumstances, the court's interest in vindicating its own authority cannot, by itself, sustain a civil contempt.¹²

¹¹ Other decisions, with similar facts, reach the same conclusion. See, e.g., *Flight Engineers v. Eastern Air Lines*, 301 F.2d 756 (5th Cir. 1962); *Blake Associates v. Omni Spectra*, 118 F.R.D. 283, 293 (D. Mass. 1988); *General Electric Co. v. Seltzer*, 161 F. Supp. 200, 201-202 (D. Del. 1958); *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, 92 F. Supp. 352, 357 (D. Minn. 1950); *White v. Lombardy Dresses*, 48 F. Supp. 730, 731-32 (S.D.N.Y. 1942); *Kerl v. Hofer*, 4 Wash. App. 559, 482 P.2d 806, 809-10 (1971); *De Rienzo v. Borrelli*, 178 Misc. 752, 36 N.Y.S. 2d 641 (1942); *Hess v. Finn*, 176 Misc. 407, 27 N.Y.S. 2d 80 (1941).

¹² These propositions are not only consistent with *Gompers*, but with this Court's related rule that civil contempt penalties terminate—regardless of any need to vindicate the court's authority—if the legal theories underlying the violated injunction prove without merit. See, e.g., *United States v. United Mine Workers*, *supra*, 330 U.S. at 295 & n.61; *Worden v. Searles*, 121 U.S. 27, 30 (1887).

In contrast, this Court's rule is that a criminal contempt penalty may normally be enforced regardless of the merits of the legal theories underlying the violated injunction. See, e.g., *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975); *Walker v. Birmingham*, 388 U.S. 307 (1967).

For example, the Second Circuit, in *Lasky v. Quinlan*, 558 F.2d 1133 (1977), dismissed civil contempt fines in a context—where the complainants, who had been jail inmates when they initiated proceedings to improve jail conditions, had each been released from jail subsequent to obtaining the contempt orders—that is logically indistinguishable from the instant case.¹³

The Second Circuit held that because “there [was] no longer any party to the [civil] action having an interest in the enforcement” of the contempt fines, those fines must be dismissed. *Id.* at 1136. And, in a passage that could not be more relevant here—and could not be more clearly in conflict with the decision below—the Court of Appeals added:

Finally, while it may be argued that the Court itself has an interest in assuring that litigants comply with its orders, it is well established that a civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court. [358 F.2d at 137 (internal quotation marks and citations omitted).]¹⁴

¹³ *Lasky* involved coercive civil contempt fines, payable to the court, that the court imposed on a county sheriff for his repeated failure to comply with court orders to improve jail conditions. As here, subsequent to the imposition of the fines but prior to their collection, the civil complainants who had sought the contempt orders had become disentitled to any further relief.

¹⁴ See also *In Re Grand Jury Proceedings*, 574 F.2d 445, 446-47 (8th Cir. 1978) (vacating a civil contempt order issued to coerce compliance with a subpoena, because the subpoena had been withdrawn: “[t]he purpose of a civil contempt order is to provide a remedy for one of the parties” and “[i]f the complaining party is no longer entitled to the benefit of the contempt order, the contempt proceeding should be terminated”); *WMATA v. ATU Local 689*, 531 F.2d 617, 622 (D.C. Cir. 1976) (court could not impose civil contempt fines *sua sponte* after civil complainant obtained contempt finding and then abandoned case, because “in the civil contempt setting, the court has no independent interest in vindicating its

3. At the same time, the decision below is part of a recent trend in the lower courts to abandon the *Gompers* view and to adopt the view that coercive civil contempt orders may rest *entirely* on the trial court's interest in vindicating its own authority, independent of any interest of the civil complainant.

This recent line of authority not only conflicts with prior decisions of this Court—and many other courts—regarding the differences in character and purpose between civil and criminal contempt, it also undermines the constitutional rights of contempt defendants by permitting the courts to employ civil contempt to pursue no purpose other than *the* purpose—vindicating the court's authority—that criminal contempt serves to vindicate.

(a) The Virginia Supreme Court cited two federal court of appeals decisions for the proposition that a court's interest in vindicating its own authority can—standing independent of the interests or desires of any civil complainant—be the basis for continuing coercive civil contempt proceedings. See App. 17a (citing *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 113 (1981); *United States v. Work Wear*

authority should its orders be violated"); *MacNeil v. United States*, 236 F.2d 149, 154 (1st Cir. 1956), *cert. denied*, 352 U.S. 912 (1956) ("trial court can have only a public, as distinguished from private, interest in the enforcement of its own decrees" and therefore "any action of contempt initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and punishment of a public wrong"); *United States v. International Union, United Mine Workers*, 190 F.2d 865, 873 (D.C. Cir. 1951) ("civil contempt proceeding is wholly remedial . . . not to deter offenses against the public or to vindicate the authority of the court"); *Parker v. United States*, 153 F.2d 66, 71 (1st Cir. 1946) ("civil contempt proceeding must be terminated" once a complainant becomes "disentitled to the further benefit of [a civil contempt] order," because a court has no such interest in maintaining in force its order").

Corp., 602 F.2d 110 (6th Cir. 1979)). These two decisions do aptly illustrate the trend noted above.¹⁵

Criden involved a journalist who was jailed for civil contempt at the motion of the United States because she refused to answer certain questions in the pretrial hearing of a criminal case. When the judge closed the record of the hearing, the contemnor moved to vacate her contempt on the basis that she could no longer submit testimony, so that the complaining party could no longer derive benefit from her confinement. The trial court denied her motion.

In affirming this judgment, the Third Circuit found the journalist's assertion that she could no longer submit testimony to be factually inaccurate, since the trial court was willing to reopen the hearing and the testimony. But that court went further and held that continued imprisonment under the civil contempt order was justified regardless of whether the defendant's testimony was still needed. This was so because "[s]anctions for civil contempt may be used . . . to coerce the defendant into compliance with the court's order, thereby vindicating the court's institutional authority." 633 F.2d at 352.¹⁶

In *Work Wear Corp.*, the Sixth Circuit upheld a district judge's refusal to reduce a civil contempt fine despite

¹⁵ For other recent decisions that are similar to *Criden* and *Work Wear*, see *SEC v. American Board of Trade*, 830 F.2d 431, 441 (2d Cir. 1987), *cert. denied*, 485 U.S. 938 (1988) (affirming trial court's *sua sponte* initiation of civil contempt proceedings and imposition of civil contempt fines despite admission that "we have found no case permitting such a practice"); *Clark v. International Union, United Mine Workers*, 752 F. Supp. 1291, 1298-1301 (W.D. Va. 1990) (district court *sua sponte* initiating civil contempt proceedings, imposing fines, and holding that such fines survive settlement of underlying civil litigation).

¹⁶ In the *Criden* court's view, allowing a contemnor to escape a court's civil contempt sanction whenever the initial complaining party no longer needs or wants the performance at issue, would relegate the district court to "the role [of] . . . a hired umpire dragged in from the street to preside over a dispute between private litigants." *Id.*

the stipulation of all parties to the civil litigation that the fine be reduced. The court of appeals reasoned that the "contempt sanction imposed was . . . designed to secure compliance with and respect for the court's order"; this was an interest of the court that civil parties could not waive. 602 F.2d at 115. The court of appeals reasoned that although the contempt at issue was civil, "there is no bright dividing line between civil and criminal contempt," and "[v]indication of judicial authority is [an interest] present in both." *Id.*¹⁷

While the court below is quite right that its decision is consistent with this recent line of decisions, neither its decision, nor the decisions it cited, are consistent with the decisions of this Court or the many decisions of other courts that we have cited. This conflict over *Gompers'* meaning—which goes to the essential natures of civil contempt and criminal contempt—is one that has reached a dimension calling for this Court's intervention.

III. THE EXCESSIVE FINES ISSUES

The Virginia Supreme Court rejected the contention that the civil contempt fines of \$52,000,000 ordered by the trial judge here are so excessive that their imposition violates both the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth

¹⁷ The principal precedents of this Court that *Criden* and *Work Wear* cite for their view of coercive civil contempt are *Hutto v. Finney*, 437 U.S. 678, 691 (1978) and *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977). See, e.g., *United States v. Criden*, *supra*, 633 F.2d at 352 & n.2; *Work Wear*, *supra*, 602 F.2d at 115. Neither *Hutto* nor *Juidice* were cases involving civil or criminal contempts, and neither purported in any way to call into question any aspects of this Court's previously established jurisprudence in the contempt area. The cited *dicta* in *Hutto* and *Juidice* are nothing more than general statements that civil contempt sanctions, which are remedial in nature, may serve to vindicate the court's authority at the same time as serving the relevant private interests. That point does not in any way support the proposition that civil contempt proceedings can be pursued solely to vindicate the authority of a court, wholly independent of any private remedial purposes. See *Gompers*, *supra*, 221 U.S. at 443.

Amendment. This Court is presently considering two cases which present the same constitutional issues.

In *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992), the Court will determine whether a state's imposition of a \$10 million punitive damages award for conduct that caused only modest financial injury violates substantive due process.¹⁸ And, in *Austin v. United States*, No. 92-6073, *cert. denied*, 61 L.W. 3496 (Jan. 15, 1993), this Court will decide whether the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture actions brought by the government, and, if so, state the test for determining when a civil penalty is unconstitutionally excessive.¹⁹

Punitive damages awards in tort cases and civil forfeiture orders, like the "civil contempt" fines which are at issue here, are intended to operate as deterrents to identified wrongful behavior that also might, but need not, have risen to the level of criminal conduct. The amount of such civil penalties is not intended to compensate any victims of wrongdoing; the purpose is to coerce future compliance with a particular legal norm. Because all three of these civil penalties serve a single office in our system of civil justice, all three should be subject to the same constitutional safeguards.

¹⁸ Specifically, the Court granted *certiorari* to decide, *inter alia*, the following question: "Did excessive and disproportionate nature of \$10 million punitive damages award violate potential lessor's substantive due process rights?" 61 L.W. 3320 (Nov. 30, 1992).

¹⁹ Specifically, the Court granted *certiorari* to address the following questions: (1) "Should concepts of proportionality arising from the Eighth Amendment be applied to forfeiture of property under 21 U.S.C. § 881(a)(4) and (a)(7)?"; (2) "When showing is made that the forfeiture of property is excessive, must government show that interest ordered forfeited is not so grossly disproportionate to offense committed by property owner as to violate Eighth Amendment's prohibitions of cruel and unusual punishment and excessive fines?" 61 L.W. 3516 (Jan. 26, 1993).

In this action, the Virginia Supreme Court held that a government agent may seek—absent *any* claim of compensatory damages and against the will of both parties—to collect civil contempt fines of \$52,000,000, clearly among the largest civil contempt fines ever levied.²⁰ If there is ever to be a case in which the Constitution would condemn a civil penalty as so grossly excessive as to amount to a violation of the Due Process Clause or Excessive Fine Clause, this is that case.

Thus, *TXO Production* and *Austin* potentially affect the instant petition, which should, at a minimum, be held pending the issuance of the decisions in those cases.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

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²⁰ We have examined all cases classified under the West Key Number System as Contempt 75 (Amount of Fine) and discovered no case imposing a civil contempt sanction equal to or in excess of \$52 million. We have been informed by the United States Department of Justice that the United States does not compile statistics related to the amounts of civil contempt fines, and is not aware of any other entity which might do so.

92-1625
No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
v. *Petitioners,*
JOHN L. BAGWELL; CLINCHFIELD COAL Co.; and
SEA "B" MINING Co.,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Virginia

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

SUPREME COURT OF VIRGINIA

Nos. 910634, 920299

JOHN L. BAGWELL, Special Commissioner

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*

v.

CLINCHFIELD COAL COMPANY, *et al.*

Nov. 6, 1992

Present: CARRICO, C.J., and COMPTON,
STEPHENSON, WHITING, LACY and HASSELL, JJ.,
and HARRISON, Retired Justice.

STEPHENSON, Justice.

In these consolidated appeals, the principal issue we address involves the validity and enforceability of certain contempt fines imposed by the trial court against International Union, United Mine Workers of America and International Union, United Mine Workers of America, District 28 (collectively, the Union) for the Union's violation of the court's injunction.

I

In early April 1989, the Union called a strike against Clinchfield Coal Company and Sea "B" Mining Company (collectively, the Company) after the expiration of a collective bargaining agreement between the parties. Thereafter, the Company undertook to conduct its operations by using replacement workers.

On April 12, 1989, the Company filed a verified bill of complaint against the Union seeking to have the trial court enjoin the Union from engaging in certain alleged unlawful activities. On April 13, 1989, following an evidentiary hearing, the court enjoined the Union and its members from obstructing certain entrances to the Company's property, from throwing rocks and other objects at vehicles and persons engaged in the Company's operations, from placing objects designed to cause damage to vehicle tires upon any surface that might be used by vehicles engaged in the Company's operations, and from intimidating and threatening physical harm to persons engaged in the Company's operations and to members of their families. The court also limited the number of pickets at various locations. On April 21, 1989, the court amended and strengthened its injunction upon a finding that, notwithstanding the initial injunction, "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction have continued."

For the duration of the strike, the Union engaged in wholesale violations of the court's injunction. The court responded to these violations by entering a series of orders finding the Union guilty of civil contempt. In an effort to compel compliance with its injunction, the court established a prospective fine schedule. When violations persisted, fines were assessed against the Union in accordance with the previously established schedule.

On September 21, 1989, the court appointed special commissioners to collect the increasing, but unpaid, fines.

John L. Bagwell, appellant in Record No. 910634, later was substituted as special commissioner to collect the fines.

The Union appealed eight contempt orders to the Court of Appeals, contending that the fines assessed were criminal sanctions imposed in a civil proceeding and thereby violative of certain constitutional guarantees. Five of the orders are involved in Record No. 910634, and the remaining three orders are involved in Record No. 920299.

Prior to oral argument in the Court of Appeals, the Union and the Company settled the underlying strike and their litigation. Thereafter, the Union and the Company moved the trial court to vacate all fines. The trial court vacated those fines that were payable to the Company.¹ The trial court, however, refused to vacate the fines payable to the Commonwealth and to Russell and Dickenson Counties. These fines are the subject of these appeals. In its reply briefs in the Court of Appeals, the Union asserted that the strike settlement mooted the subject fines.

While the first appeal (Record No. 910634) was pending in the Court of Appeals, but after oral argument, Bagwell petitioned to be made a party in the appeal or, in the alternative, to be permitted to file a brief *amicus curiae*. The Court of Appeals refused to allow Bagwell to intervene but permitted him to file an *amicus curiae* brief. Subsequently, the Court of Appeals ruled, in a two-to-one decision, that the fines were mooted by the settlement of the strike. *United Mine Workers v. Clinchfield Coal Co.*, 12 Va.App. 123, 402 S.E.2d 899 (1991).

We awarded Bagwell an appeal in Record No. 910634. At the same time, we certified Record No. 920299 from the Court of Appeals and consolidated the two appeals.

¹ It is not clear from the record that all fines payable to the Company were expressly vacated. The parties, however, agree that these fines were vacated.

II

The evidence of injunction violations is too voluminous for a detailed recitation. It consists of many days of testimony by approximately 260 witnesses and numerous exhibits. Significantly, the Union has not challenged the sufficiency of this evidence in these appeals.

In the early stages of the strike, the violations were largely of a nonviolent nature consisting mainly of mass picketing and sit-ins to block ingress to and egress from the Company's property. In the first contempt order, entered on May 18, 1989, the court found 72 separate violations of its injunction, only 15 of which were violent.² In that order, the court established its prospective fine schedule for future injunction violations. The schedule provided for fines of \$100,000 for each violent violation and \$20,000 for each nonviolent violation.

The court conducted a second contempt hearing on June 2, 1989. This hearing produced evidence of continued blockage of the Company's entrances and exits by mass picketing and sit-ins. By an order entered June 7, 1989, the Union again was held in contempt, and fines were imposed in accordance with the established fine schedule. These fines, totalling \$2,465,000, were payable to the Commonwealth. The contempt order stated that "[i]t is the Court's intention that these fines are civil and coercive."

Following the second contempt order, the Union changed its strategy. The Union planned to delay and impede the Company's movement of coal by the use of slow-moving automobile convoys manned by Union members and out-of-state sympathizers. To support this effort, the Union opened "Camp Solidarity" as a place for the

² The court imposed \$642,000 in fines, \$424,000 of which were suspended, for these violations. These fines subsequently were vacated because the trial court determined that they were "criminal in nature."

participants to congregate and organize the convoys. Approximately 1,000 persons would stay at the camp.

A multitude of violent acts accompanied this new strategy, including gunfire directed at coal truck drivers' vehicles. Consequently, on July 27, 1989, the court entered a third contempt order. In this order, the court found the Union guilty of 46 injunction violations and imposed fines totalling \$4,465,000, of which \$2,000,000 was ordered to be paid to the Commonwealth, \$1,465,000 to Russell County, and \$1,000,000 to Dickenson County. In its pronouncement from the bench following the third contempt hearing, the court stated, *inter alia*, the following:

[The court] find[s] that . . . [the Union] and [its] members have engaged in acts of violence that are directly related to their picketing in this labor dispute and that they have been characterized by mass picketing and blocking of rights of ways, both public and private; the hurling of rocks and other missiles at vehicles; . . . and . . . have intimidated or attempted to intimidate by threats and by violence members of this community who are attempting to exercise their rights to go to work and make a living under the Virginia law.

. . . .

This court's injunction is designed to keep the peace here in Virginia and to be sure that . . . the citizens of this state, in these communities, can live in peace, free from the acts of terror which have been committed upon this community.

Following the third contempt order, the court heard testimony from more than 60 witnesses concerning escalated violence. The record is replete with evidence of incidents of rock-throwing and the use of "jackrocks."³

³ A "jackrock" is made from nails welded together in such a way that a point is always aimed upward when the device is thrown upon the ground. These devices are designed to puncture vehicle tires.

Coal truck drivers and Company personnel and members of their families were subjected to attacks and intimidation. Numerous vehicles were damaged by various devices. The record also discloses that Union officials took active roles in these unlawful activities.

Thus, on September 21, 1989, the Union again was found in contempt for 65 violent and 24 nonviolent violations of the injunction. Following the established fine schedule, the court fined the Union a total of \$16,900,000 and directed that it be paid as follows: \$6,000,000 to the Commonwealth, \$4,500,000 to Russell County, and \$3,000,000 to Dickenson County. The court also directed that the remainder, \$3,400,000, be paid to the Company; however, this fine was vacated subsequently.

In its fifth contempt order, entered on October 9, 1989, the court found 69 additional violent violations of its injunction. The acts were similar to those previously described, to-wit: rock throwing, jackrocking, intimidation, etc. The court, in accordance with the established fine schedule, assessed the Union an additional \$6,900,000 in fines, of which \$2,500,000 was made payable to the Commonwealth, \$1,200,000 was made payable to Dickenson County, and \$1,800,000 was made payable to Russell County. The court directed that \$1,400,000 be paid to the Company; however, this fine was vacated subsequently.

By its sixth, seventh, and eighth contempt orders, which are the subject of appeal in Record No. 920299, the trial court found continuing injunction violations which were similar in nature to the violations previously described. In addition, the trial court found that the Union had taken possession of the Company's coal processing plant on September 17, 1989, and had unlawfully occupied it for four days.

The court, in the sixth contempt order entered November 16, 1989, found 72 injunction violations, 40 of which

were violent. These acts of violence included physical beatings and death threats. Fines totalling \$15,800,000 were levied in accordance with the established fine schedule. The court later vacated \$3,000,000 of these fines which were to have been paid to the Company. The court directed that the remainder of the fines be paid as follows: \$5,700,000 to the Commonwealth, \$4,350,000 to Russell County, and \$2,750,000 to Dickenson County.

Following a hearing on November 15 and 16, 1989, the court entered its seventh contempt order. In this order, entered on December 15, 1989, the court, in accordance with the established fine schedule, imposed fines totalling \$7,300,000 for 31 violations, 24 of which were violent. The court directed that the fines be paid as follows: \$2,650,000 to the Commonwealth, \$2,000,000 to Russell County, and \$1,250,000 to Dickenson County. The court also directed that the remainder, \$1,400,000, be paid to the Company; however, this fine was vacated subsequently.

On December 7 and 8, 1989, the Union again was before the court for violating the injunction. In its eighth contempt order, entered on December 15, 1989, the court found 38 violations of its injunction, 32 of which were violent, and, following its established fine schedule, imposed fines of \$10,300,000, of which \$3,700,000 was made payable to the Commonwealth, \$2,800,000 was made payable to Russell County, and \$1,800,000 was made payable to Dickenson County. The court later vacated \$2,000,000 of these fines, which were to have been paid to the Company.

III

The Union has moved for a dismissal of Bagwell's appeal (Record No. 910634) on four grounds. First, the Union contends that Bagwell does not have standing to appeal because he has no personal interest in the subject of this litigation. The Union asserts that, as a special

commissioner of the court, Bagwell is merely a ministerial officer of the court. Therefore, the Union concludes, Bagwell cannot attain the status of a party. According to the Union, only the Company, the adverse litigant, has standing to defend and collect contempt fines payable to the Commonwealth or its political subdivisions.

In order to determine whether Bagwell is a ministerial officer of the court or someone entitled to party status, we must look to the purpose of his appointment. We also must look to the powers and duties granted to him by the court.

For more than six months, the trial court had tried, without success, to curb the Union's unlawful conduct by imposing contempt fines. Finally, by exercising its inherent equity power, the court appointed special commissioners to collect the accumulated fines. The initial order of appointment stated as follows:

It appearing to the Court that the defendants have not paid any of the previously liquidated fines, and the defendants advising the Court that no efforts are foreseen to effect payment of such fines, it is therefore FURTHER ORDERED that. . . . [the] special commissioners are directed to proceed immediately to collect all such fines and are authorized and empowered to undertake all necessary or convenient means of collection, including, but not limited to, docketing, interrogatories, levy, execution, garnishment, attachment, and creditor's bill, wherever the defendants may have property or assets, until all such fines are paid in full. In addition, said special commissioners upon petition to the Court for leave so to do shall have the power to employ counsel and accountants to assist them in their work. All fines collected shall be paid to the Clerk of this Court and distributed by the Court.

Subsequently, the court appointed Bagwell in the place of the original special commissioners. The court, in a

pronouncement from the bench, made clear Bagwell's role:

The Court is . . . appointing Mr. Bagwell to act in the stead of the Commonwealths' Attorneys of these two jurisdictions which are affected, Russell and Dickenson Count[ies], Virginia, as both of their Commonwealths' Attorneys have asked to be disqualified. . . . [The court] want[s] this Order to reflect that [Bagwell] is appointed to act as Commonwealth Attorney for any collection procedures that are necessarily implemented by the Commonwealths' Attorneys.

The order of appointment provides additional insight into Bagwell's powers and duties:

John L. Bagwell is hereby appointed special commissioner in the place and stead of the former special commissioners and as attorney to act in the place and stead of the Commonwealth's Attorneys for Russell and Dickenson Counties to collect all unpaid and unbonded fines. . . . John L. Bagwell, who has been designated to succeed [the original commissioners] as special commissioner, shall succeed to all the functions, powers, duties and obligations of the prior special commissioners. . . . The said John L. Bagwell shall have authority to take all actions as may be necessary to collect the fines including but not limited to the filing of legal actions, pleadings, notices, liens, the retaining of other attorneys, accountants experts and others necessary, but with prior approval of the Court, in any jurisdiction necessary to effect the intent of this Order.

The Union relies upon *Brown v. Howard*, 106 Va. 262, 55 S.E. 682 (1906), in support of its contention that Bagwell has no standing to appeal. It argues that *Brown* "is dispositive as to the restricted parameters" of the role of a special commissioner.

In *Brown*, a special commissioner appointed in a court's decree to sell real property sought to appeal the court's action in setting aside that decree. 106 Va. at 263, 55 S.E. at 683. In dismissing the appeal for want of jurisdiction, we noted that "[t]he record fails to disclose that the [special commissioner] has any personal interest in the subject matter of [the] litigation." *Id.* We also stated that the special commissioner was "a mere ministerial officer of the court, whose powers and duties, *ipso facto*, ceased upon the setting aside of the decree of sale." *Id.*

Brown is distinguishable from the present case because Bagwell, unlike the special commissioner in *Brown*, is clothed with broad powers and duties. Indeed, Bagwell was appointed to act in the place and stead of the attorneys for the Commonwealth, and, as such, he is the special attorney for the Commonwealth and the Commonwealth's agent for the collection of the fines. Additionally, unlike the special commissioner in *Brown*, Bagwell's powers and duties have not been terminated, but, according to the order of appointment, are to continue "until all . . . fines are paid in full." Thus, by intervening in and prosecuting this appeal, Bagwell would be discharging the duties of his office. *Brown*, therefore, is inapposite.

Accordingly, we hold that, under the particular facts and circumstances of this case, Bagwell is the one party who does have standing to represent the interests of the Commonwealth and two of her counties in defending the validity of the subject fines.

Second, the Union contends that, even if Bagwell has standing to appeal, he should not be permitted to intervene in the first instance on appeal. Third, the Union contends that, even if a party may intervene in the first instance on appeal, the granting or denying of a motion to intervene is discretionary with a court and that the Court of Appeals did not abuse its discretion in denying the motion.

Intervention is "[t]he procedure by which a third person, not originally a party to the suit, but claiming an interest in the subject matter, comes into the case, in order to protect his right or interpose his claim." *Black's Law Dictionary* 820 (6th ed. 1990). We previously determined that Bagwell claims an interest in the subject matter of this appeal, *i.e.*, the fines payable to the Commonwealth and to the counties. Unquestionably, he sought intervention in order to protect his right, to interpose his claim, and to discharge successfully the duties of the office imposed upon him by the court.

We previously have not decided whether a party may intervene in the first instance on appeal. In the present case, the Company suddenly withdrew as appellee while this appeal was pending in the Court of Appeals. Consequently, only Bagwell, as special commissioner, could have urged the Court of Appeals to uphold the validity of the subject fines. He was the logical replacement for the Company in that role. Moreover, the Union could not have been prejudiced by his intervention. Thus, under the circumstances of this case, we hold that the Court of Appeals erred in denying Bagwell's motion to intervene.

Finally, the Union contends that, even if Bagwell had the right to intervene and the Court of Appeals erred in denying intervention, Bagwell's appeal was not filed timely. We do not agree. The order denying intervention was not a final, appealable order because it did not dispose of the whole subject matter of the case. *See Burns v. The Equitable Associates*, 220 Va. 1020, 1028, 265 S.E.2d 737, 742 (1980). Bagwell's appeal from the Court of Appeals' order disposing of the whole subject matter of the case was filed timely.⁴

⁴ We also reject the Union's claim that Bagwell, by the filing of a brief *amicus curiae* in the court of appeals, waived his objection to the denial of his motion to intervene. By accepting a less favorable ruling, a litigant does not waive his objection to a denial of what would have been a more favorable ruling.

IV

Having determined the procedural issues, we now consider whether the fines payable to the Commonwealth and to the two counties are valid and enforceable. In Record No. 910634, the Court of Appeals assumed, without deciding, that the subject fines were civil sanctions and determined that the fines were coercive, rather than compensatory. 12 Va.App. at 128-29, 402 S.E.2d at 902-03. The Court of Appeals further held that "civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines." *Id.* at 133, 402 S.E.2d at 905. Accordingly, the Court of Appeals ruled that the fines involved in this appeal are moot. *Id.* at 134, 402 S.E.2d at 905. Bagwell assigns error to this ruling.

Bagwell contends that the subject fines are prospective, coercive, civil contempt fines that are not rendered moot by the settlement of the underlying labor dispute. The Union contends that the fines are criminal in character and, therefore, are invalid because they were imposed without the mandated constitutional protections. The Union further contends that, even if the fines are civil, the Court of Appeals properly vacated the fines as moot.

A

Contempts are classified as either "criminal" or "civil," although each "may partake of the characteristics" of the other. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911). "It is not the fact of punishment but rather its character and purpose, that often serve to distinguish between the two classes of cases." *Id.*

The punishment, whether fine or imprisonment, is deemed to be criminal if it is determinate and unconditional, and such penalties "may not be imposed on some-

one who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632-33, 108 S.Ct. 1423, 1429-30, 99 L.Ed.2d 721 (1988). The punishment is deemed to be civil if it is conditional, and a defendant can avoid such a penalty by compliance with a court's order. *Id.* at 633, 108 S.Ct. at 1430. Civil contempt sanctions are either compensatory or coercive. Compensatory, civil contempt sanctions compensate a plaintiff for losses sustained because a defendant disobeyed a court's order. Coercive, civil contempt sanctions are imposed to compel a recalcitrant defendant to comply with a court's order. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 700-01; 91 L.Ed. 884 (1947); *Gompers*, 221 U.S. at 448, 31 S.Ct. at 500; *United States v. Darwin Const. Co., Inc.*, 873 F.2d 750, 753-54 (4th Cir.1989).

To determine whether the fines imposed in the present case are valid and enforceable, we first must determine what type of contempt fines were assessed by the trial court. After its first contempt hearing, the trial court found that the Union had committed numerous injunction violations and imposed fines therefor. These fines were determinate and unconditional. Subsequently, however, the court vacated these fines, concluding that they were criminal in nature and, therefore, violative of the Federal Constitution. Clearly, the trial court ruled correctly in vacating these fines.

Significantly, the court, in its first contempt order, established a prospective fine schedule in an effort to coerce the Union into complying with the court's injunction. The judge clearly stated his position at that time.

[T]he union and its members are responsible for how much money . . . is going to be paid, not this Court, not the company, not anyone else. If you go out and violate the law, you are taking that action

of your own free will and . . . you will pay the consequences, because it is your act.

....

I firmly believe that the fate of the union with regard to these violations is in the hands of those members and leadership that we have seen here in court today. . . . I sincerely hope that you will be able to conduct yourself in a law abiding manner. . . .

Following the second contempt hearing, the court found that the Union had committed numerous additional violations of its injunction. Accordingly, the court imposed fines in accordance with the previously established fine schedule. Again, the judge made clear the reason for the fine schedule, stating, "I don't know how much money these two defendants are willing to pay before they will obey the law. I hope [the fine schedule] will deter any further violations."

As time passed, the violations increased in frequency and became more violent. Indeed, after the third contempt hearing, the court described the situation as follows:

[T]his . . . has been a strike . . . that is characterized by violence and terrorism on the part of the members of the [local district] acting for the International Union in carrying out this strike here in Southwest Virginia against the Plaintiffs. It has become a situation that this Court feels is intolerable.

It is abundantly clear from the record that the court established the fine schedule and thereafter imposed the subject fines in an effort to coerce the Union into compliance with the court's injunction. The court continued to make clear that the Union had the power to avoid imposition of fines.

The Court is convinced, as [it has] stated numerous times, that this is a civil contempt proceeding. The only way that any fines or any penalties can be as-

sessed is for the defendants to fail to comply with the Court's injunctive orders and the laws of the Commonwealth of Virginia as [they] are stated or . . . outlined in the order. This is not punitive. It is compulsory. It is designed to compel compliance and therefore it is not criminal in nature but civil.

Notwithstanding the trial court's clear intent and its consistent imposition of fines pursuant to the previously established fine schedule, the Union asserts that the fines are criminal in nature and, therefore, invalid. The Union acknowledges that civil contempt fines are valid when they are imposed to coerce a party to perform an *affirmative act*. The Union contends, however, that where, as here, the injunction *prohibits* the doing of an act, all fines imposed for violating the prohibition are criminal sanctions. We reject this contention because we think it presents a distinction without a difference.

When a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control of his destiny. The same is true with respect to the court's orders in the present case. A prospective fine schedule was established solely for the purpose of coercing the Union to refrain from engaging in certain conduct. Consequently, the Union controlled its own fate.

Thus, we hold that the fines in question are valid, coercive, civil fines. It is important to reiterate that the Court of Appeals also concluded that "these fines [are] coercive civil fines, not compensatory civil fines." 12 Va.App. at 129, 402 S.E.2d at 903. Furthermore, other courts share our view respecting the validity of employing a prospective, civil fine schedule to coerce defendants into future compliance with a court's *prohibitory* injunction. See, e.g., *New York State Nat. Organization For Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir.1989), cert. denied, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532

(1990); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 532-33 (9th Cir.1991); *Clark v. International Union, UMW*, 752 F.Supp. 1291, 1297 (W.D.Va.1990).⁵

B

Next, we must determine whether the subject fines are moot. The Union contends that, even if the fines are valid, the Court of Appeals correctly held that they became moot when the underlying litigation between the Company and the Union was settled. We agree with the Court of Appeals that "whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law" and that we previously have not addressed the issue. 12 Va.App. at 132, 402 S.E.2d at 904. We do not agree with the Court of Appeals, however, in its conclusion that the settlement mooted the fines.

In reaching that conclusion, the Court of Appeals relied upon *Local 333B, United Marine Division v. Commonwealth*, 193 Va. 773, 71 S.E.2d 159, cert. denied, 344 U.S. 893, 73 S.Ct. 212, 97 L.Ed. 690 (1952), and *United Steelworkers v. Newport News Shipbuilding*, 220 Va. 547, 260 S.E.2d 222 (1979). 12 Va.App. at 132, 402 S.E.2d at 904-05. Neither of these cases, however, supports the Court of Appeals' conclusion.

Local 333B dealt exclusively with criminal contempt, and we simply affirmed the procedure of transferring the criminal contempt proceeding from the equity to the law side of the court. 193 Va. at 780, 71 S.E.2d at 164. The case did not involve coercive, civil fines, and mootness was not an issue.

In *United Steelworkers*, we held that the trial court improperly imposed unconditional, criminal sanctions in

⁵ *Clark* arose out of the strike involved in the present appeals and also concerned coercive, civil contempt fines and the issue of their mootness. The *Clark* court refused to vacate the fines upon settlement of the underlying litigation. 752 F.Supp. at 1302.

the course of a civil contempt proceeding. 220 Va. at 551, 260 S.E.2d at 225. Coercive, civil fines were not involved in the case, and the court was not presented with a mootness issue.

Courts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained. If we were to adopt the Union's mootness contention, any organization which faced coercive, contempt fines would know that, in order to completely avoid payment of the fines, it only had to postpone actual collection of the fines until the settlement of the underlying litigation.

Thus, we hold that the fines in question are not moot. While the mootness issue is governed by state law, our resolution of the issue is consistent with federal decisions. See, e.g., *United States v. Criden*, 633 F.2d 346 (3d Cir.), cert. denied, 449 U.S. 1113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1980); *United States v. Work Wear Corp.*, 602 F.2d 110 (6th Cir.1979).

Nor is our holding inconsistent with *Gompers*, which is relied upon by the Union and which is distinguishable. In *Gompers*, the defendants were found to have violated an injunction that prohibited, among other things, the continuation of a boycott against the complainant company. 221 U.S. at 419, 31 S.Ct. at 492. The complainant company sought such "relief as the nature of its case may require," *id.* at 423, 31 S.Ct. at 493, whereupon the court improperly sentenced the defendants to jail terms, *id.* at 425, 31 S.Ct. at 494. The company then moved for "its costs against the defendants under the proceedings in contempt against them," which motion the trial court granted. *Id.* While an appeal of the criminal sanctions and compensatory, civil sanctions was pending in the Supreme Court, the parties settled their dispute. *Id.* at 427, 31 S.Ct. at 495. The Supreme Court set aside the criminal sanctions and ruled that the settlement of

the underlying dispute mooted the company's claim for compensatory, civil relief. *Id.* at 451-52, 31 S.Ct. at 501-02.

In *Gompers*, unlike in the present case, the only relief sought was compensatory relief to be paid to the complainant company, which had settled its case. *Gompers* did not involve coercive, civil contempt sanctions.

V

The Union further contends that the subject fines are so excessive that they violate substantive due process and federal labor policy. The Union relies primarily upon *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. —, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), in support of its due process contention. These cases, however, deal with the issue of punitive damages and have nothing to do with coercive, civil fines imposed for contempt of court.

Likewise, the cases cited by the Union to support its federal-labor-policy contention, *Union Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), and *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), do not address the imposition of coercive, civil contempt fines. Additionally, it is firmly established that federal labor relations statutes do not preclude a state from exercising its powers to maintain law and order during a strike. *Lodge 76, Etc. v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 136, 96 S.Ct. 2548, 2550, 49 L.Ed.2d 396 (1976); *Local No. 1111, Etc. v. Wisconsin E.R. Board*, 315 U.S. 740, 748-49, 62 S.Ct. 820, 824-25, 86 L.Ed. 1154 (1942).

Admittedly, the fines in the present case are large. However, considering the Union's vast financial resources and the magnitude of the injunction violations, we cannot say that they are excessive as a matter of law. As

previously noted, the imposition of fines was the only device available to the trial court to coerce the Union into compliance with the court's injunction. Notwithstanding the large fines, the Union never represented to the court that it regretted or intended to cease its lawless actions. To the contrary, its utter defiance of the rule of law continued unabated. Indeed, the record discloses that the Union committed more than 500 separate violations of the trial court's injunction.

VI

Finally, the Union contends that the trial judge erred in refusing to recuse himself. (Record No. 920299). The Union based its recusal motion on two incidents: (1) the defeat of the judge's father's bid for reelection to the Virginia House of Delegates by a Union official, and (2) an alleged confrontation between the judge's father and a Union member that resulted in a criminal misdemeanor charge having been lodged against the father.

When these incidents occurred, the trial court's injunction had been in effect for more than six months. Also, several contempt hearings had been conducted, and a number of contempt orders imposing large fines had been entered well in advance of the Union's motion for recusal.

Whether a judge should recuse himself in a given case is a matter resting within the exercise of his reasonable discretion. *Deahl v. Winchester Dept. Soc. Serv.*, 224 Va. 664, 672-73, 299 S.E.2d 863, 867 (1983). On appeal, the judge's decision in the matter will not be reversed absent a showing that the judge abused his discretion. *Stockton v. Commonwealth*, 227 Va. 124, 141, 314 S.E.2d 371, 382, cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). In the circumstances of this case, we cannot say the judge abused his discretion. Indeed, the record suggests that he properly denied the recusal motion.

The judge made clear his opinion that the events involving his father had no effect upon his ability to remain impartial in the case. The judge characterized the election contest as being "exactly the type of peaceful action that [the] Union and all members of our society ought to take advantage of." The judge further opined that he much would prefer that "any particular politician be ousted from office, *including any relative of [his]*, than to have one more rock thrown at another person whereby [that person's] safety is put in peril." (Emphasis added.) The judge also correctly noted that the critical decisions were made by him long before the recusal motion was filed.

Therefore, we reject the Union's contention. In doing so, we conclude that a fair reading of the record clearly shows that the trial judge demonstrated a high degree of fairness, patience, and even-handedness in presiding over this complex and protracted case.

VII

In conclusion, we hold that (1) the Court of Appeals erred in refusing to allow Bagwell to intervene; (2) the fines in question are valid, coercive, civil contempt fines imposed pursuant to an established, prospective fine schedule; (3) the subject fines were not mooted by the parties' settlement of the underlying strike and litigation; (4) the fines are not excessive in violation of substantive due process or federal labor policy; and (5) the trial judge did not err in refusing to recuse himself.

Accordingly, we will allow Bagwell to intervene as a party, we will reverse the Court of Appeals' judgment and enter final judgment in favor of Bagwell in Record No. 910634, and we will affirm the trial court's judgment in Record No. 920299.

Record No. 910634: *Reversed and final judgment.*

Record No. 920299: *Affirmed.*

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 6th day of March, 1992.

Record No. 920299

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
against *Appellants*,
CLINCHFIELD COAL COMPANY, *et al.*,
Appellees.

From the Circuit Court of Russell County

It appears that appeals have been filed with the Court of Appeals of Virginia in Record Nos. 1953-89-3 and 1508-90-3 through 1513-90-3, that the matters have not been determined by said court, and that the cases are of such imperative importance as to justify the deviation from normal appellate practice and to require prompt decision in the Supreme Court.

Upon consideration whereof, this Court, acting on its own motion at the suggestion of Special Commissioner John L. Bagwell, certifies these cases for review pursuant to the provisions of Code § 17-116.06(A) and (B)(1), and consolidates them with Record No. 910634.

This order shall constitute certification pursuant to Rule 5:23 that an appeal has been awarded.

A Copy,

Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 5th day of March, 1992.

Record No. 910634

Court of Appeals Nos. 0790-89-3, 0904-89-3,
1287-89-3, 1333-89-3, 1629-89-3 and 1743-89-3

JOHN L. BAGWELL, Special Commissioner,
Appellant,
against

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA AND INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Appellees.

From the Court of Appeals of Virginia

Upon the petition of John L. Bagwell, Special Commissioner, an appeal is awarded him from a judgment rendered by the Court of Appeals of Virginia on the 26th day of March, 1991; upon the petitioner, or some one for him, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the Circuit Court of Russell County in the penalty of \$500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

In addition to the assignments of error, the parties shall brief and argue the matters raised in the appellees' motion to dismiss.

Justice Keenan and Senior Justice Poff took no part in the consideration of this case.

A Copy,

Teste:

/s/ David B. Beach
Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on March 5, 1992 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 6th day of March, 1992.

/s/ David B. Beach
Clerk

COURT OF APPEALS OF VIRGINIA

Record Nos. 0790-89-3, 0904-89-3,
1287-89-3, 1333-89-3, 1629-89-3
and 1743-89-3

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*

v.

CLINCHFIELD COAL COMPANY, *et al.*

March 26, 1991

Present: KOONTZ, C.J., and BAKER and COLE, JJ.

KOONTZ, Chief Judge.

This appeal arises from a series of contempt judgments and corresponding fines exceeding twenty million dollars entered by the Circuit Court of Russell County against the International Union and the Local District 28 Union of the United Mine Workers of America (Unions), appellants, at the request of Clinchfield Coal Company and Sea "B" Mining Company (Companies), appellees. For the reasons that follow, we vacate the fines imposed by the circuit court.

I. Factual Background

The record in this case is voluminous. We summarize only the essential facts for purposes of this opinion.

On April 4, 1989, the unions commenced a strike against the Companies in protest of alleged unlawful labor practices by the Companies. In response, on April 12, 1989, the Companies filed a bill of complaint in the circuit court alleging that the Unions and others acting in concert with them were violating Virginia's right to work law. The Companies sought an injunction to prohibit that conduct. On April 13, 1989, the circuit court issued an injunction and established picketing guidelines and prohibited certain strike-related activities, such as the use of tire puncturing devices. As the strike continued, the circuit court modified the injunction in an effort to prevent violations of the Companies' rights and Virginia's right to work law.

Notwithstanding the injunction, numerous acts involving violence and non-violence, which can only be described fairly as massive, were reported that were in violation of the injunction. As a result, the circuit court entered rules to show cause against the Unions. At the first show cause hearing, held on May 16, 1989, the court found there had been seventy-two separate violations of the injunction. Based on its findings in the May 16 hearing and without indicating the standard of proof being applied, the court by order entered on May 18 found the Unions in contempt and imposed fines on them totalling \$616,000. The court suspended \$400,000 of these fines conditioned on the Unions' paying the unsuspended portion within ten days and thereafter complying with the injunction. The fines were directed to be paid to the Commonwealth. The court also set a prospective fine schedule for future injunction violations whereby peaceful violations would result in \$20,000 "civil" fines and violent violations would result in \$100,000 "civil" fines.

A second contempt hearing was held on June 2, 1989, from which the court entered a second order adjudicating the Unions in contempt. Based on its findings that the Unions had continued to violate the injunction and in ac-

cordance with its previously set fine schedule, the court reinstated the suspended fines from its May 18 order and fined the Unions a total of \$2,465,000, payable to the Commonwealth. In its order, the court stated that "the evidence proves beyond a reasonable doubt that [the Unions] have intentionally violated" the injunction. However, the court also declared, "[i]t is the court's intention that these fines are civil and coercive." In the same order, the court set forth a new fine schedule "for the purpose of coercing the defendants to comply with the court's injunctions."

On July 27, 1989, the court entered a third contempt order wherein the court found that the Unions repeatedly violated the injunction through violent and non-violent acts, including the failure to use all lawful means to ensure compliance. During the hearing upon which this order was entered, the court again declared the standard of proof applied to the evidence was "beyond a reasonable doubt," but explained that it was doing so "out of an abundance of caution." Without adhering to its new fine schedule, the court imposed on the Unions fines totalling \$4,465,000, payable to the Commonwealth, Russell County, and Dickenson County. Subsequently, in a hearing held on August 16, 1989, the court informed the Unions that they had no right to a jury trial because they were not being tried for criminal contempt and that "these were civil proceedings."

On August 29, 1989, the Companies filed their seventh motion for rule to show cause, which moved the court for a rule to show cause why the Unions should not be held in civil or criminal contempt and for "such other relief as the court deems appropriate." After issuing a rule to show cause and holding a hearing for the rule, the court entered a fourth contempt order in which it found beyond a reasonable doubt that the Unions had continued to violate the injunction. The court imposed on the Unions fines totalling \$16.9 million, of which

\$13.5 million were made payable to the Commonwealth, Russell County, and Dickenson County. The remaining \$3.4 million were directed to be paid to the Companies, even though the Companies did not present any evidence of pecuniary losses to the court.

In a fifth contempt order entered on October 9, 1989, the court found the Unions guilty beyond a reasonable doubt of 71 violations of the injunction and fined them \$6.9 million, payable to the Commonwealth, Russell County, and Dickenson County. Once again, the court apparently imposed the fines without considering any evidence of pecuniary losses. In a hearing held on the same day, the court reiterated its position that the proceedings were civil rather than criminal, and that it was using monetary means to coerce the Unions into compliance with the injunction.

II. Procedural Background

Following the Unions' timely appeal to this Court, the Unions filed their initial brief asserting, in addition to numerous other issues, that the fines in question were criminal sanctions imposed in a civil proceeding and in violation of certain constitutional guarantees. In response, the Companies on brief asserted that the fines were coercive civil fines and were properly imposed. Prior to oral argument in this Court in support of their positions on brief, the parties settled the underlying strike and this litigation. By joint motion dated January 29, 1990, the parties moved the circuit court for entry of an order contemplating dissolution of the pending injunctions, vacation of all fines, including those at issue in this appeal, and dismissal of the litigation.

Thereafter, in accordance with the agreement with the Unions, the Companies filed in this Court a Statement of Position In Lieu of Brief and Motion to Withdraw. The Companies therein acknowledged the settlement of the strike and the litigation, supported the vacation of the

fines, and because they "[could] no longer function as an adversary in this appeal" requested that they be dismissed as parties to this appeal. The Unions filed their reply brief in which, without abandoning their original position that the fines were criminal sanctions, they asserted that based on the parties' settlement this appeal should be dismissed as moot, with directions that the fines involved in this appeal be vacated, as contemplated by the parties' agreement.¹

Oral argument was held in this Court on October 9, 1990. The Companies took no part in this hearing. Thereafter, and before a decision was reached in this Court, John L. Bagwell, Special Commissioner previously appointed by the circuit court to collect the fines imposed against the Unions, petitioned this Court to be made a party in these proceedings or in the alternative to be permitted to file a brief *amicus curiae*. We denied the request of Bagwell to be made a party, but permitted the filing of the *amicus curiae* brief. The Unions timely filed a reply brief.

III. The Issues

Initially, we were called upon to decide whether the fines involved in this appeal were criminal or civil sanctions for violation of the circuit court's injunction. The distinction between criminal and civil contempt sanctions has been the subject matter of many opinions from various state and federal courts and is a matter involving the difficult application of well settled rules. We draw this distinction and apply these rules in *International Union, United Mine Workers of America v. Covenant Coal*, — Va.App. —, 402 S.E.2d 906 (1991), decided this date, which involves litigation arising from the same

¹ On brief it is now acknowledged that the trial court has denied the joint request to vacate the fines payable to the Commonwealth and Russell and Dickenson County. The fines payable to the Companies have been vacated. We accept this acknowledgement only for the purpose of clarity in the procedural background of this case.

labor dispute involved in this appeal. However, in this appeal it is not necessary, or appropriate, for us to determine whether the fines in question are criminal or civil because the result would be the same under the view we adopt. If determined to be criminal fines improperly imposed in a civil proceeding without the necessary constitutional protections, the fines could not stand. *United Steelworkers v. Newport News Shipbuilding*, 220 Va. 547, 260 S.E.2d 222 (1979). Accordingly, for purposes of our decision here, we assume, without deciding, these fines are civil sanctions. The dispositive issue then becomes whether the settlement of the dispute and litigation between the parties requires that the civil fines imposed as a part of the injunction suit must be set aside. We turn now to address that issue.

IV. Discussion

The *amicus* brief brings this issue into focus. First, it is asserted, and we agree, that civil contempt sanctions may be subdivided into two sub-categories. Compensatory civil contempt sanctions, as the name suggests, compensate the plaintiff for losses sustained because of the defendant's non-compliance or disobedience of a court's order. Coercive civil contempt sanctions, again as the name suggests, are imposed to coerce a defendant into complying with the orders of a court. See generally *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911). In *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336 (3d Cir.1976), the Court in addressing these sub-categories made the following helpful observations:

[C]ompensatory actions are essentially backward looking, seeking to compensate the complainant through the payment of money for damages caused by past acts of disobedience. Coercive sanctions, in

contrast, look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the court order or by assuring that a potentially contumacious party adheres to an injunction by *setting forth in advance the penalties the court will impose if the party deviates from the path of obedience*

[T]he court may levy a fine of a specified amount for past refusal to conform to the injunction, *conditioned, however, on the defendant's continued failure to obey*. The court may also specify that a disobedient party will be fined a certain amount for each day of non-compliance. Indeed, the methods that may be employed to coerce a recalcitrant party into compliance with an injunction are many and varied.

Id. at 1344 (emphasis added) (footnotes omitted).

With the exception of the initial unsuspended fines, the circuit court clearly imposed the type of coercive, conditional fines recognized in *Latrobe*. For purposes of distinguishing between compensatory and coercive civil sanctions, we need not consider the unsuspended fines which have obvious indications of criminal sanctions for past violations of the court's order. Nor need we consider the fact that the court did not adhere to its previously set fine schedule in the third contempt order for the purpose of drawing a distinction between compensatory and coercive civil fines. The Companies presented no evidence of losses resulting from the Union's disobedience of the court's injunctive order. Without such evidence, the circuit court could not and did not seek to impose compensatory fines. Moreover, the voluminous record in this case makes it clear that the court imposed the fines in question to coerce compliance with its orders rather than to compensate the Companies. A review of the facts in the record which reflect the magnitude of the violations involved and the

resulting impact on the operations of the Companies, as well as the communities at large persuade us, as apparently they persuaded the circuit court, that fines of considerable magnitude were reasonably required to coerce compliance from the Unions. Consequently, we conclude that these fines were coercive civil fines, not compensatory civil fines.

The distinction between the two sub-categories of civil sanctions for contempt is relevant to the disposition of the ultimate issue in this appeal. Neither the parties nor *amicus curiae* dispute that compensatory fines should be vacated upon the settlement of the litigation between the parties. What is disputed is whether coercive civil fines should also be vacated or left to the discretion of the trial court to be vacated in whole or in part.

The Unions contend that all civil contempt sanctions, whether compensatory or coercive, imposed during the prior proceedings must be vacated when the litigation in which they were imposed is settled by the parties. The Unions rely primarily on the seminal case of *Gompers* for this position. The *amicus* brief asserts that coercive civil contempt fines have the dual purpose of coercing compliance with the court's orders and of vindicating the court's authority. This latter purpose forms the basis for the further assertion that the trial court has the discretion to refuse to vacate or to modify the amount of the sanctions if the court determines that maintaining the fines would vindicate the authority of the court even where, as here, the parties jointly move to vacate or to modify the sanctions. While recognizing that in the context of vindicating the authority of the court such civil fines are similar to criminal fines, which survive the settlement of the underlying litigation, the *amicus* brief asserts that the civil nature of the contempt is not turned criminal by the court's efforts at self-vindication. See *United States v. Wendy*, 575 F.2d 1025, 1029, n. 13 (2d Cir. 1978).

In support of the assertion that *Gompers* does not mandate that all civil contempt fines, whether compensatory or coercive, be vacated upon the settlement of the underlying civil litigation, the *amicus* brief cites us to the recent decision of *Clark v. International Union, United Mine Workers*, 752 F.Supp. 1291 (W.D.Va. 1990), which arose from the same labor dispute involved in the present appeal. In *Clark*, after determining that the prospective fines imposed upon the unions were civil, coercive fines, the court refused to vacate these fines upon the settlement of the underlying labor dispute and civil litigation. The district court determined that *Gompers* does not apply to civil contempt fines imposed in a *completed* proceeding prior to settlement of the underlying dispute. Apparently, in its view, the holding in *Gompers* only establishes that in cases in which a court imposes criminal sanctions followed by settlement of the underlying dispute, no remand for civil contempt proceedings may take place in connection with the case.

United States v. Wear Corp., 602 F.2d 110 (6th Cir. 1979), is primarily relied upon by the district court for this position. In *Work Wear*, the Anti-Trust Division of the Justice Department brought a suit against Work Wear which led to a settlement that required Work Wear to divest itself of certain subsidiaries. When this did not occur within the deadline specified in the Court's order, the government obtained civil contempt fines against Work Wear for each day the divestiture did not occur beyond the deadline. Eventually, these fines amounted to over one million dollars. The parties ultimately agreed to a reduction of approximately one-half of these fines but the Court refused to follow this agreement. Upon appeal, the Sixth Circuit upheld that refusal on the basis that the lower court had not abused its discretion in refusing to reduce the fines. Mootness of the fines was not discussed. The *Clark* Court found, nevertheless, that by implication *Work Wear* stands for the proposition that

cessation of the contemptuous act does not moot the obligation to pay coercive contempt fines imposed before the end of the contemptuous conduct.

In response, the Unions assert that *Clark*, *Work Wear* and the other cases relied on in *Clark* are distinguishable on several grounds. First, the Unions assert that in *Work Wear* the underlying dispute was not *totally* settled. In addition, the Unions assert that these cases can be distinguished on the ground that they were brought by governmental agencies to vindicate public rights and in such cases the courts should review a settlement to ensure that it protects those too numerous and ill-informed to protect their own interests. In contrast, the present case involves only private parties to civil litigation which has been fully settled.

We need not address the merit of these distinctions. The *Clark* Court expresses an eloquent rationale in support of its determination that the Unions' mootness argument would undermine the efficacy of civil contempt sanctions and a court's power to enforce its orders by the use of such sanctions. We do not disagree with the sentiment inherent in the *Clark* Court's rationale.

We believe, however, that while we must follow federal law in our determination of whether a particular contempt sanction is criminal or civil for purposes of determining the proper application of federal constitutional protections, *Hicks v. Feiock*, 485 U.S. 624, 630, 108 S.Ct. 1423, 1428, 99 L.Ed.2d 721 (1988), the issue whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law. While our Supreme Court has not had the opportunity to address this particular issue, we believe *Local 333B, United Marine Division v. Commonwealth*, 193 Va. 773, 71 S.E.2d 159, cert. denied, 344 U.S. 893, 73 S.Ct. 212, 97 L.Ed. 690 (1952) and *United Steelworkers v. Newport News Shipbuilding*, 220

Va. 547, 260 S.E.2d 222 (1979) indicate that our courts should rigidly adhere to procedures that maintain the distinction between civil and criminal contempt and that the maintenance of this distinction includes the consequences that follow when private parties settle all issues following the imposition of civil contempt sanctions, whether characterized as compensatory or coercive fines. In adopting this view, we believe the authority of the court will be well defined, the rights of the parties will be protected, and the power to vindicate the authority of the courts will be maintained in an orderly fashion.

In *Local 333B*, the Court approved the procedure of transferring a criminal contempt proceeding from the equity side to the law side of the court and of changing the style of the case to reflect that the Commonwealth had intervened as a party plaintiff to prosecute the Union for criminal contempt. This approach is consistent with the well recognized principle that criminal contempt is a matter between the government and the contemnor and the sentence imposed is punitive and in the public interest since it is imposed to vindicate the authority of the court and to deter by way of example others who would violate court orders. In *Steelworkers*, the Court prohibited the imposition of criminal sanctions in a civil proceeding and denied a request for a subsequent proceeding to secure compensatory civil sanctions for the plaintiff. Implicit in these holdings, in our view, is the requirement that our courts should follow procedures designed to inform the parties of the true nature of the proceedings, while preserving the power of the courts to vindicate their authority. The view which we adopt is also consistent with principles we glean from the United States Supreme Court cases.

In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and

punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it is also seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.

Hicks, 485 U.S. at 635, 108 S.Ct. at 1431.

In the present case, the coercive civil fines were intended to coerce the Unions into compliance with the court's injunctive order for the benefit of the Companies. These fines also necessarily had the incidental purpose and effect of vindicating the authority of the court. In this respect, all coercive civil contempt sanctions vindicate to some degree the authority of the court. In our view, however, the mere fact that a civil sanction imposed to coerce compliance also vindicates a court's authority, does not require that we maintain discretion in the court to refuse to vacate such sanctions upon settlement of the underlying dispute and litigation between the private parties. Vindication of the court's authority, the acknowledged purpose of criminal contempt sanctions, remains available by criminal contempt proceedings conducted with appropriate constitutional protections for the contemnor. "When the main case is settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled, of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings." *Gompers*, 221 U.S. at 451, 31 S.Ct. at 502.

In summary, while we recognize the magnitude of the violations of the trial court's order in this case and the justifiable concern the court had with compliance with its order, we hold that civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines. This result follows even

though such fines may serve the incidental purpose of vindicating the court's authority. The court's authority in such cases may be vindicated in subsequent criminal proceedings between the Commonwealth and the contemnor conducted with appropriate constitutional protections afforded to the contemnor.

Accordingly, the fines now pending in this appeal are moot and we remand this case to the trial court with directions to vacate these fines in accordance with this opinion.

Remanded.

BAKER, Judge, dissenting.

I respectfully disagree with the finding of the majority in this case and would affirm the judgment of the trial court.

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the
6th day of December, 1990.

Record Nos. 0790-89-3, 0904-89-3, 1287-89-3,
1333-89-3, 1629-89-3 and 1743-89-3

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,

Appellants,

against

CLINCHFIELD COAL COMPANY, *et al.*,
Appellees.

From the Circuit Court of Russell County

On consideration of the motion of John L. Bagwell,
Special Commissioner, to intervene or appear *amicus*
curiae, the appellants' opposition, and the reply thereto,
the motion to intervene and to appear by counsel and
argue before this Court is denied. Leave is granted the
said John L. Bagwell, by counsel, to file a brief *amicus*
curiae in support of his legal position within fifteen days
of this date. Reply briefs may be filed within ten days
thereafter. Oral argument will not be permitted.

A Copy,

Teste:

Clerk

COMMONWEALTH OF VIRGINIA

[SEAL]

TWENTY-NINTH JUDICIAL CIRCUIT
Counties of Buchanan, Dickenson, Russell and Tazewell

August 22, 1990

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Re: Clinchfield Coal Company, et al v. International
Union, United Mine Workers of America, et al
Chancery No. 12486

Gentlemen:

This matter is before the Court upon the defendants'
motion to set aside the December 15, 1989, orders pre-
viously entered by this Court, upon the parties' joint mo-
tion for "Order Re Dismissal", and upon the several rep-
resentations of counsel and memoranda filed in support

of the parties' positions herein. The Court should note also that two memoranda have been filed by the Center on National Labor Policy Inc., as *amicus curiae*, in opposition to the plaintiffs' and defendants' joint motion.

On December 15, 1989, this Court entered three orders, one liquidating prospective fines under its sixth contempt order, and two others adjudicating the defendant in contempt and liquidating portions of the prospective fines which had been previously announced on May 16 and June 2, 1989. On January 5, 1990, at 11:30 a.m., the defendants filed a motion to set aside these three orders as being contrary to the law and the evidence along with a motion to postpone the hearing on the motion to set aside. At this time the parties announced a tentative settlement of the strike "underlying this action". The Court entered its order that day temporarily suspending the three orders of December 15, in order to provide the defendant more time to fully present its arguments and the Court more time to consider the motion to set aside and any other motions the parties might file thereafter.

After having considered the argument of counsel and the authorities submitted, it is the opinion of this Court that the defendants' motion to set aside the orders entered December 15, 1989, must be denied.

The evidence presented by the plaintiffs as to each of the allegations of contemptuous behavior proves without question that the International U.M.W.A. was the author of these actions. The fact that some of the evidence as to the defendants' complicity was circumstantial makes it no less competent or convincing.

Nor can the defendants' protestations that these proceedings were criminal contempt hearings change the fact that they were civil in nature. The Court early on announced its purpose in imposing prospective civil fines the payment of which would only be required if it were shown the defendants disobeyed the Court's orders. That purpose was to compel compliance with the Court's or-

ders which were entered to protect the rights of the plaintiffs and the public. The fines were conditional and it was within the defendants' sole power to avoid payment of the fines.

The Supreme Court of the United States in *United States v. United Mine Workers of America*, 330 U.S. 258, 304-305, 67 S.Ct. 677, 701 (1947) has specifically sanctioned the imposition of monetary fines payable to the Court to compel a recalcitrant defendant (the same defendant as in this case) to discontinue a strike it had called. The United States Court of Appeals for the Second Circuit has likewise found that the imposition of fines "in terrorem" is authorized as a means of securing future compliance with a decree. *Sunbeam Corp. v. Golden Rule Appliance, Co., Inc.*, 252 Fed. 467, (1958). In that case the defendant was ordered to pay a competitor a \$2,500.00 fine for every future sale of the competitor's product in violation of a consent decree. The fine there, as here, was imposed only conditionally and depended upon the contemnor's future conduct. The contempt sanctions imposed by this Court were civil in nature, not criminal. Thus, defendant had no right to trial by a jury or to a public prosecutor.

Defendants complained of the Court's appointment of counsel for plaintiff as Special Commissioners to collect the fines imposed. This issue is now moot as Messrs. Hodges and Massie have been relieved of those duties.

The remaining grounds assigned by defendants in its motion to set aside are without merit and the Court overrules the motion. The Court would comment, though, that the interpretation of the evidence with regard to the existence of "roving pickets" and the understanding of the bases of the Court's findings argued by defendants' counsel belie their intelligence and are tributes to their inventiveness. This Court in its earlier orders specified the sites where picketing would be authorized along with the number of pickets allowed at each site. The

evidence presented at all of the hearings showed a constant pattern of pickets locating themselves at various unauthorized places from which they would move to another picket site when police or others attempted to investigate incidents. The evidence of moving or roving picketing was overwhelming.

The parties filed a joint motion for "Order Re Dismissal" on January 24, 1990, when they again represented to the Court that they had come upon a tentative settlement of the strike, and asked the Court to rule immediately on this motion even though the proposed agreement had to be submitted to the U.M.W.A. members for a ratification vote—something which had not even been scheduled at that time. The Court conducted two hearings during which it was shown a written agreement entered into by the parties purportedly resolving the many cases in litigation spawned by the strike. At the parties' request the Court viewed *in camera* a supplemental agreement between them containing portions of their pact which the International Union desired not be made public. Certain "submissions" were made by the defendant in which it proposed to have its membership perform community service work in order to purge itself of contempt. On February 12, 1990, the Court ruled from the bench that it would not, upon the evidence, the representations and the argument presented to that data vacate its orders imposing the civil fines merely because the parties agreed it should do so. Thereafter, an additional "submission" was filed by the defendant, increasing the number of hours of community service proposed, together with several additional memoranda by Clinchfield, the U.M.W.A. and the Center on National Labor Policy, Inc. (as *amicus curiae*). Subsequently there was also proposed to the Court a hearing at which the top leadership and management of the parties would appear to discuss various issues with the Court. The Court was of course available for such a hearing, but none was ever scheduled even though several weeks passed

after the proposal was made. It appearing that nothing further will be forthcoming on these issues, the Court considers them ripe for adjudication.

The parties have requested dismissal of this lawsuit and dissolution of the injunctions entered. There is no question that upon reaching a settlement of their disputes these litigants are entitled to have such requests granted. The Court will, therefore, enter an order dismissing plaintiffs' Bill of Complaint for injunctive relief and dissolving all injunctions insofar as they grant relief to the plaintiffs.

The parties have also requested vacation of all orders imposing fines for contempt, including not only those entered December 15, 1989, but also judgments entered more than twenty-one days prior to the filing of the motion. Virginia Supreme Court Rule 1:1 provides that "All final judgments, orders and decrees, . . . shall remain under the control of the trial court for twenty-one days after the dates of entry, *and no longer*." (Emphasis supplied). Defendants have noted appeals of the orders entered before December 15, 1989, and they are now before the Court of Appeals of Virginia. Having taken the position that these orders are final and therefore ripe for appeal (a position with which this Court agrees), the defendants cannot now argue to the contrary. These orders are beyond the reach of this Court and shall remain undisturbed.

Turning to the December 15 orders now, the Court is told that because this is a civil suit, the litigants are entitled, upon announcing a settlement of their disputes, to have the contempt proceedings dismissed and all fines previously liquidated vacated. The Court is cognizant of the principles of law upon which the argument is founded but disagrees with the contention that they require in this case the action requested of the Court.

The underlying action upon which these civil contempt proceedings are dependent is, of course, plaintiffs' suit for

injunctive relief, the purpose of which was to obtain the preventive power of a Court of Equity 1) to protect the company from the power of a large labor union unlawfully used against it, and 2, to protect its employees, servants, contractors, their families and members of the general public from defendants' unlawful acts. Clinchfield sought government intervention to prevent the obstruction of private and public rights of ways; the intimidation and coercion of any persons entering or leaving plaintiffs' worksites; the threatening and assaulting of persons; the throwing of rocks and other missiles at vehicles or persons; the placing of devices designed to puncture tires of automotive traffic on private and public roads; the obstruction of the vision of those operating motor vehicles; the following or trailing of company employees and their families, and so on. The Court granted much of the relief requested finding defendants were interfering with the rights of the plaintiffs *and* those of the general public.

Moreover, with the passage of time defendants' strategy for conducting the strike shifted from acts affecting primarily the company to acts affecting both those members of the public associated with the company and those who had no connection with any of the litigants. The focus and loci of defendants' unlawful conduct shifted from company property and facilities to the public highways and private homes and businesses. So, as the strike proceeded, the protection sought from and granted by the Court was more and more for the general public. Concomitant action by the executive branch of this Commonwealth's government brought scores of Virginia State Police officers, Department of Transportation workers, etc., and millions of dollars worth of equipment to the task of protecting the rights of not only the litigants, but the general public as well. Thus, when the Court found it necessary to liquidate the prospective fines imposed, and when defendant strenuously objected to awarding them to Clinchfield, the bulk of the fines were made payable to

the Commonwealth and the two counties most heavily affected by the unlawful activity. From its institution, and more as it proceeded, this case has involved the protection of the rights of the general public in addition to those of the plaintiffs. In *Gompers v. Buck Stove & Range Co.* 221 U.S. 418 (1911), the United States Supreme Court employed an analysis of the purpose of a suit and the relief awarded in determining whether litigants are entitled to a dismissal of contempt proceedings. Although in that case the Court ruled in favor of the requested dismissal, analysis of the purpose of this suit and the nature of the relief awarded shows there are substantial differences in the facts there and here, differences so significant as to compel an opposite result.

Additionally, the motion for "Order Re Dismissal" was not made until January 24, 1990, 19 days after the Court agreed to suspend the operation of its December 15, 1990 orders concerning contempt. Even at that time their request was not to dismiss the cause, but to enter an order stating the Court's *intention* to dismiss it upon the ratification of the then tentative labor contract and cessation of the strike. The Court's rulings finding the defendant guilty of several counts of contempt, liquidating numerous fines and apportioning them among the plaintiff, Dickenson and Russell Counties and the Commonwealth were announced from the bench December 8, 1989, and reduced to written form by the orders entered December 15, 1989. The effects of these rulings were suspended by order entered January 5, 1990, to allow the Court time to consider defendants' motion to set aside. The request for vacation of the contempt fines came too late.

What is more, the parties announced only *tentative settlement* of their dispute. Even the language of the proposed order was conditional, only to be given effect should the proposed labor contract be ratified by the U.M.W.A. membership. Defendants even argued that the Court's entry of the proposed order was a condition pre-

requisite to the submission of the contract proposal to its membership. Although the Court is aware that the proposal was indeed ratified by the unions' membership in February, 1990, and the Court assumed that the strike and picketing against plaintiffs has indeed ceased, the Court feels strongly that the parties attempted by these motions to set aside and to dismiss and vacate to manipulate the Court's decision making process and the orderly disposition of these matters. Basically, the parties attempted to extort the desired ruling from the Court by making it appear final settlement of this bitter, violent labor dispute was contingent upon that favorable ruling. The parties did not act in good faith.

Although the law favors the resolution of disputes by compromise and settlement rather than by litigation, *Bangor Punta Operations, Inc. v. Atlantic Leasing Ltd.*, 215 Va. 180, 207 S.E.2d 858, the reason for this rule is instructive. Settlement is less expensive and less time consuming. It saves time, effort and expense of the parties, the attorneys and the courts. Compromise and settlement is said to be conducive to more amicable relations between the parties. (15 *Am. Jur. 2d, Compromise and Settlement*, Section 6). Here, no time can be saved nor expense avoided. The parties' time, effort and money have already been expended; nor will the attorneys' or Court's time be saved—it has already been consumed; nor will future relations of the parties be affected when both parties have joined in the motion to dismiss/vacate and done their utmost to obtain a favorable ruling.

Here, the parties rested their cases, submitted the issues to the Court, and the Court ruled and entered its orders. In effect the original parties came upon a settlement of their differences after judgment. Had the rulings been such that Clinchfield was the sole beneficiary of the judgments of the Court, it would be simple enough for the parties to effect their object. The judgments, however, made the Commonwealth and two of its political subdivisions recipients of portions of the liquidated fines.

Due to the nature of defendants' unlawful conduct, the nature of the relief requested by Clinchfield, and the protection the Court granted, the public, the citizens of this Commonwealth, were necessarily intimately affected and were the intended beneficiaries of the suit and the relief granted. There is a decisive difference between such a case and one involving only the litigants or one in which the Court-ordered protection is focused solely on the litigants. The Supreme Court of the United States has recognized that the payment of fines to the Court is proper remedial relief when payment can be avoided by compliance with the Court's order. *Hicks v. Feiocks*, 485 U.S. 624, 99 L. Ed. 2d 721 (1988). Certainly the same is true of fines the Court makes payable to other branches of the government. Where, as here, the public's welfare is so intimately involved and the Court has granted civil contempt relief payable in effect to the public, and where judgment has been announced and entered, the public's interest must be considered. There can be no "settlement" without the consent of at least all those whom the relief granted is intended to benefit. No such consent is present in this case. Neither the Commonwealth, nor the two counties, nor the Court has agreed to the vacation of these fines.

The Court must also take into consideration the fact that the defendants have made no meaningful effort to purge their contempt. The offer to have its members perform a paltry 10,000 or even 20,000 hours of community service to atone for the repeated, massive, violent violations of this Court's orders is an affront to our system of law and to the Court. Likewise, if ever a party has come to the bar seeking equity with unclean hands, the defendants in the case have. Not only have they violated the injunctions put down to protect the plaintiffs and the public, but they have refused to abide by the Court's judgments, e.g.: directing payment of fines and service of the orders upon its membership. The

International, U.M.W.A. remains defiant and deserves no relief.

This Court's judgments will be given effect to the extent that consent to vacate them is lacking. As the plaintiffs have indicated their consent, and since they can easily have any judgment in their favor marked "satisfied" by the Clerk, so much of the fines as were directed payable to Clinchfield shall be vacated. The remainder shall be paid by the defendants with interest from December 15, 1989. The suspension of those portions of all orders adjudicating contempt, liquidating fines against the defendants, and directing the method and time of payment of the fines shall be terminated and they shall remain intact and in effect. All fines liquidated by the orders entered December 15, 1989, shall be payable to the recipients through the Clerk of this Court no later than 10 days after the entry of the order commemorating the rulings herein.

The Court will appoint John L. Bagwell, Esquire, of Grundy, Virginia, to act in the place and stead of the Commonwealth's Attorneys of Russell and Dickenson Counties, who have both asked to be disqualified in all these cases, and to act as Special Commissioner in Chancery for the purpose of collecting any unpaid fines due and payable to those political subdivisions and the Commonwealth at a fee to be approved by the Court. The Court shall further direct Mr. Bagwell to take all actions necessary to immediately begin collection of any fines remaining unpaid after the date specified above and to report to the Court his efforts and the results of those efforts at collection.

In its comments from the bench in response to the motions disposed of by the rulings in this opinion, the Court expressed its concern over the need to establish and protect the rule of law and the authority and power of courts to enforce the law. The conduct of the defendants throughout the history of this litigation has certainly

given rise to grave concerns over whether they will be governed by the law and the institutions created by to administer the law, or whether they will be permitted to operate outside the rules of society establishes for the conduct of affairs amongst its members. Because the judgments heretofore entered are civil in nature, and because the contempt proceedings previously had were for the purpose of persuading the defendants to stop violating the rights of plaintiffs and the citizens of these communities, and because there is evidence before the Court that the defendants have violated several of this Court's orders, and because it is imperative that if the defendants have knowingly violated these orders, they must be made to realize the consequences thereof, the Court is of the opinion that criminal contempt proceedings must be instituted to determine whether the defendants or its members have been guilty of knowingly violating these orders.

Mr. Hodges is directed to prepare at the very earliest date practicable an appropriate order in accordance with the rulings herein for endorsement by counsel and entry by the Court.

Very truly yours,

/s/ Donald A. McGlothlin, Jr.
DONALD A. MCGLOTHLIN, JR.
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

IN CHANCERY No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

ORDER

The Court has before it for decision defendant International's Motion to Set Aside Order of December 15, 1989 as Being Contrary to the Law and Evidence and the parties' Joint Motion for Order Re Dismissal.

Upon consideration of all arguments and authorities submitted, and for the reasons set forth in the Court's letter to counsel dated August 22, 1990, it is ADJUDGED and ORDERED as follows:

1. The Motion to Set Aside Order of December 15, 1989, as Being Contrary to the Law and Evidence is denied.

2. The Orders of June 7, 1989 (Second Contempt Order), July 27, 1989 (Third Contempt Order), September 21, 1989 (Fourth Contempt Order), and October 9, 1989 (Fifth Contempt Order) are beyond the reach of the Court and shall remain undisturbed.

3. Plaintiffs' Amended Bill of Complaint is dismissed and the Injunction of April 13, 1989, and Amended Injunction of April 21, 1989, are dissolved insofar as they grant relief to plaintiffs.

4. Those portions of the fines liquidated in the Court's three Orders entered December 15, 1989 (Order Liquidating Fines under Sixth Contempt Order and the Seventh and Eighth Contempt Orders) which are payable to the plaintiffs, totalling \$6,400,000, are hereby vacated. These Orders shall otherwise remain intact and in effect and their suspension is hereby terminated. Such remaining fines, with interest from December 15, 1989, shall be paid to the Clerk of this Court within ten days after the date of entry of this Order.

5. Except as stated in paragraphs 3 and 4 above, the Joint Motion Re Dismissal is denied.

6. John L. Bagwell is hereby appointed special commissioner in the place and stead of the former special commissioners and as attorney to act in the place and stead of the Commonwealth's Attorneys for Russell and Dickenson Counties to collect all unpaid and unbonded fines. Wade W. Massie and Stephen M. Hodges, the special commissioners previously appointed by this Court, shall prepare and provide to all parties and to this Court a complete and accurate report of the accounts of all amounts collected pursuant to this Court's Orders and the disposition thereof, including a detailed, itemized and fully documented report of all receipts, earnings on such amounts, charges against such amounts, and any other material matter. John L. Bagwell, who has been designated to succeed Messrs. Massie and Hodges as special commissioner, shall succeed to all the functions, powers, duties and obligations of the prior special commissioners. Messrs. Massie and Hodges and all other attorneys, accountants or others shall immediately make available to Mr. Bagwell all documents and files generated by them as special commissioners in Chancery or in furtherance of the special commissioner's collection efforts to John L. Bagwell and shall cooperate with him in the transferral of all files, information, etc., and shall make themselves available to meet with him to explain all actions taken, all

documents in their possession and to answer such questions as Mr. Bagwell may have concerning their conduct as special commissioners in Chancery, attorney, accountant, etc., concerning his duties as their successor. The said John L. Bagwell shall have authority to take all actions as may be necessary to collect the fines including but not limited to the filing of legal actions, pleadings, notices, liens, the retaining of other attorneys, accountants experts and others necessary, but with prior approval of the Court, in any jurisdiction necessary to effect the intent of this Order.

ENTER: this 11th day of September, 1990.

/s/ Donald A. McGlothlin, Jr.
DONALD A. MCGLOTHLIN, JR.
Judge

Seen and Objected to:

/s/ Illegible
Counsel for Plaintiffs

/s/ Illegible
Counsel for International and
Hudson

/s/ Illegible
Counsel for District 28 and
Other Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

IN CHANCERY No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

ORDER

The Court has had under advisement the question of what sanctions, if any, should be imposed for injunction violations occurring before the prospective fines were announced on May 16, 1989, and has received and considered the briefs and arguments of counsel on this point, and on December 15, 1989, the Court advised counsel of its decision.

For reasons previously stated, the Court is of the opinion that the prospective fines announced May 16, 1989, are civil and coercive in nature, but the fines for violations occurring on or before May 16, 1989, are criminal in nature. Although the violations did occur and there was no objection to imposition of criminal fines until after the hearings on May 16, 1989, and June 2, 1989, the Court concludes that it should not impose these criminal fines.

It is therefore ORDERED that the following fines be, and they are hereby, vacated and set aside:

1. The \$1,000 fine and \$12,000 suspended fine against Marty D. Hudson for injunction violations in the Court's Order of May 18, 1989;
2. The \$1,000 fine and \$12,000 suspended fine against Jackie Stump for injunction violations in the Court's Order of May 18, 1989;
3. The \$26,000 fine and \$150,000 suspended fine against District 28 for injunction violations in the Court's Order of May 18, 1989; and
4. The \$190,000 fine and \$250,000 suspended fine against the International for injunction violations in the Court's Order of May 18, 1989.

It is further ORDERED that no criminal sanctions will be imposed in this case for the pre-May 17, 1989, injunction violations proven by plaintiffs at the hearing on June 2, 1989.

All other rulings of the Court on May 16, 1989, and June 2, 1989, and all other portions of the Court's Order of May 18, 1989, shall remain in full force and effect.

ENTER: this 21st day of December, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen and objected to:

/s/ Illegible
Counsel for Plaintiffs

Seen:

/s/ Illegible
Counsel for Defendants
International and Hudson

/s/ Illegible
Counsel for Defendants
District 28 and Others

VIRGINIA:

IN THE SUPREME COURT OF RUSSELL COUNTY

In Chancery No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

EIGHTH ORDER ADJUDICATING DEFENDANT IN CONTEMPT

On December 7-8, 1989, this matter was before the Court on the Tenth Rule to Show Cause issued against defendant International Union, United Mine Workers of America (the International). The International's motion to dismiss the tenth rule and motion for a jury trial were denied for the reasons stated in the record. At the conclusion of the evidence on December 8, 1989, and argument of counsel, the Court announced its decision from the bench.

Upon consideration, the Court finds that the evidence shows beyond a reasonable doubt that the International is in contempt of Court for the following violations of the Court's injunctions and liquidates the prospective fines previously announced on May 16 and June 2, 1989, as follows:

198 a 1	violence	\$ 500,000
198 a 2	violence	500,000
199	violence	100,000
205	violence	100,000

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206 a 1	violence	\$ 100,000
207 a 3	violence	100,000
208 b	roving/moving	1,000,000
207 a 3	violence	100,000
208 a 1	violence	100,000
208 a 2	violence	100,000
211 a 1	violence	100,000
211 b	roving/moving	1,000,000
211 a 3	violence	100,000
211 a 4	violence	100,000
212 a 2	violence	500,000
212 a 3	violence	100,000
212 a 4	violence	100,000
212 b	roving/moving	1,000,000
212 a 3	violence	100,000
214	violence	100,000
215 a 1	violence	100,000
215 a 2	violence	100,000
215 a 4	violence	100,000
215 b	roving/moving	1,000,000
216 a 1	violence	500,000
216 a 2	violence	100,000
216 a 3	violence	100,000
217 a 1	violence	100,000
217 a 2	violence	100,000
219 a 1	violence	100,000
219 a 2	violence	100,000
219 a 3	violence	100,000
220	violence	100,000
221 a 1	violence	100,000
222	violence	100,000
223 a	failure to use all lawful means	1,000,000
223 b	failure to report violences	500,000
TOTAL		\$10,300,000

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On motion of plaintiffs, the following specifications were nonsuited: 202, 203 a 1, 203 a 2, 204, 207 a 1, 209 a 1, 212 a 1, 213 a 1, 216 a 6, and 216 a 7. The remainder of the specifications in the Tenth Rule (not adjudicated above or nonsuited) are dismissed with prejudice.

It is ORDERED that the International shall pay the foregoing \$10,300,000 in fines to the Clerk of this Court by 4:00 p.m., December 15, 1989, as follows:

\$3,700,000 to the Clerk of this Court for the Commonwealth of Virginia;
 \$2,800,000 to the Clerk of this Court for Russell County, Virginia;
 \$1,800,000 to the Clerk of this Court for Dickenson County, Virginia; and
 \$2,000,000 to the Clerk of this Court for Clinchfield Coal Company and Sea "B" Mining Company.

The following individuals, International officers and members of the International's Executive Board, are ORDERED, individually and collectively, to take all actions necessary to effect immediate payment of all outstanding fines under the Court's Third, Fourth, and Fifth Orders Adjudicating Defendant in Contempt; and they are also ORDERED, individually and collectively, to take all actions necessary to effect payment of the fines liquidated under the Sixth, Seventh, and this Eighth Order Adjudicating Defendant in Contempt and under the Order Liquidating Fines under Sixth Contempt Order, by 4:00 p.m., December 22, 1989:

Richard L. Trumka
 Cecil E. Roberts
 John J. Banovic
 Tommy E. Buchanan
 Robert Burchell

Charles Dixon
 Larry Joe Draper
 Howard L. Green
 Anthony Grajeda
 Stuart L. Johnson
 Daniel J. Kane
 Anthony R. Kujawa
 Lyle McGowan
 Roger T. Myers
 Jerome Neal
 Walter E. Oviatt
 Cecil M. Partin
 William C. Ray
 James Russell
 Thomas J. Shumaker
 Jimmy H. Smith
 Jackie Stump
 C. Danny Surface
 Stephen F. Webber

It is further ORDERED that counsel for defendant shall immediately notify each of the foregoing officers and executive board members of the rulings announced by this Court on December 8, 1989.

It is further ORDERED that the Clerk shall forthwith cause a copy of the following orders to be served by certified mail, return receipt requested, restricted delivery, on each of the foregoing officers and executive board members:

—Fourth Order Adjudicating Defendant in Contempt, entered September 21, 1989;

—Fifth Order Adjudicating Defendant in Contempt, entered October 9, 1989;

—Sixth Order Adjudicating Defendant in Contempt, entered November 16, 1989;

—Order Liquidating Fines Under Sixth Contempt Order, entered this day;

—Seventh Order Adjudicating Defendant in Contempt, entered this day; and

—Eighth Order Adjudicating Defendant in Contempt, entered this day.

It is further ORDERED that, until all fines are paid or properly bonded, the foregoing officers and executive board members shall cause a copy of each of the foregoing orders to be read in full at every meeting of the officers or the executive board, by the secretary-treasurer of the International, John J. Banovic, who shall file an affidavit with the Clerk of this Court immediately after each such meeting stating the date, time and location of such meeting and whether or not the orders were read as here directed; in addition, it is ORDERED that the person who gives notice of any future meeting of the officers or executive board shall also give contemporaneous notice of such meeting to the Clerk of this Court by telephone and certified mail, return receipt requested, restricted delivery, said notice stating the precise date, time, and location of such meeting.

The Court has previously appointed Stephen M. Hodges and Wade W. Massie special commissioners to collect fines liquidated under the Third Order Adjudicating Defendants in contempt entered July 27, 1989, and under the Fourth Order Adjudicating Defendant in Contempt entered September 21, 1989. The defendants have filed a motion to quash execution or for a stay of execution and a motion for an injunction against the special commissioners. Upon consideration of said motions, and the briefs and arguments of counsel, it is ORDERED that said motions be, and they are hereby, denied. It is further ORDERED that the special commissioners, either

of whom may act, are appointed to collect all unpaid and unbonded fines under the Fifth, Sixth, Seventh, and this Eighth Order Adjudicating Defendant in Contempt and under the Order Liquidating Fines under Sixth Contempt Order. The special commissioners are directed to proceed immediately to collect all such fines and are authorized and empowered to undertake all necessary or convenient means of collection, including but not limited to, docketing, interrogatories, lien notices, levy exception, garnishment, attachment, and creditor's bill, wherever the defendants may have property or assets, until all such fines are paid in full. The special commissioners are further authorized to employ attorneys and accountants in any jurisdiction to assist them in the collection or the prosecution or defense of any litigation, related to the collection. All fines collected shall be paid to the Clerk of this Court and distributed by the Court.

In view of defendant's contempt, the refusal of defendant to pay or bond fines previously announced, the absence of any representation by defendant that it will attempt to pay or bond such fines, the necessity for speedy action to make this Order effective, and for good cause shown, it is further ORDERED that judgment shall be immediately docketed and execution shall immediately issue if the fines liquidated by this Order are not paid or bonded by the date and time stated above.

This Order is entered pursuant to due notice and waiver of appearance and endorsement by counsel for defendants.

ENTER: this 15th day of December, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen:

/s/ Stephen M. Hodges
Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

IN CHANCERY No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

SEVENTH ORDER ADJUDICATING DEFENDANT
IN CONTEMPT

On November 15-16, 1989, this matter was before the Court on the Ninth Rule to Show Cause issued against defendant International Union, United Mine Workers of America (the International). The International's motion to dismiss the ninth rule and motion for a jury trial were denied for the reasons stated in the record. At the conclusion of the evidence presented and arguments of counsel, the Court took the case under advisement and announced its decision on December 8, 1989.

Upon consideration, the Court finds that the evidence shows beyond a reasonable doubt that the International is in contempt of Court for the following violations of the Court's injunctions and liquidates the prospective fines previously announced on May 16 and June 2, 1989, as follows:

181.1 a	violence	\$ 100,000
181.1 c	violence	100,000
181.2 b	violence	100,000
181.2 c	violence	100,000
181.3 b	violence	100,000

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182 a	violence	100,000
182 c	violence	100,000
183 b 1	picket limitations	
183 b 2	roving/moving	
183 b 4	blocking entrance	1,000,000
186 b	violence	100,000
186.5 a	violence	100,000
188 a 1	violence	100,000
188 a 4	violence	100,000
188 a 5	violence	500,000
190 a 1	violence	100,000
190 a 2	violence	100,000
190 a 2.5	violence	100,000
191.5 d	violence	100,000
192 b	roving/moving	1,000,000
193 a 2	violence	100,000
193 a 4	violence	100,000
193 a 5	violence	100,000
193 a 6	violence	100,000
193 a 7	violence	100,000
193 a 8	violence	100,000
195 a 1	violence	100,000
195 a 2	violence	100,000
195 b	roving/moving	1,000,000
197 a	failure to use all lawful means	1,000,000
197 b	failure to report violations	500,000
TOTAL		<u>\$7,300,000</u>

On motion of plaintiffs, the following specifications were nonsuited: 181.3 a and 192 a 1. The remainder of the specifications in the ninth rule (not adjudicated above or nonsuited) are dismissed with prejudice.

It is ORDERED that the International shall pay the foregoing \$7,300,00 in fines to the Clerk of this Court by 4:00 p.m., December 22, 1989, as follows:

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\$2,650,000	to the Clerk of this Court for the Commonwealth of Virginia;
\$2,000,000	to the Clerk of this Court for Russell County, Virginia;
\$1,250,000	to the Clerk of this Court for Dickenson County, Virginia; and
\$1,400,000	to the Clerk of this Court for Clinchfield Coal Company and Sea "B" Mining Company.

In view of defendant's contempt, the refusal of defendant to pay or bond fines previously announced, the absence of any representation by defendant that it will attempt to pay or bond such fines, the necessity for speedy action to make this Order effective, and for good cause shown, it is further ORDERED that judgment shall be immediately docketed and execution shall immediately issue if the fines liquidated by this Order are not paid or bonded by the date and time stated above.

The International's officers and executive board members are ORDERED to take action to pay these fines and to take other measures as set forth in the Court's Eighth Order Adjudicating Defendant in contempt entered today, and special commissioners are appointed and empowered as set forth in that Eighth Order.

This Order is entered pursuant to due notice and waiver of appearance and endorsement by counsel for defendants.

ENTER: this 15th day of December, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen:

/s/ Stephen M. Hodges
Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

IN CHANCERY No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
*Defendants.*SIXTH ORDER ADJUDICATING DEFENDANT
IN CONTEMPT

On October 23-24, 1989, this matter was before the Court on the Eighth Rule to Show Cause issued against defendant International Union, United Mine Workers of America(the International). At the conclusion of the evidence presented and arguments of counsel, the Court took the case under advisement and announced its decision on October 30, 1989.

Upon consideration, the Court finds that the evidence shows beyond a reasonable doubt that the International is in contempt of Court for the following violations of the Court's injunctions:

154 a 1	violence
154 a 2	violence
155 a 1	violence
155 a 3	violence
155 b 1	illegal picket site
156 b 1	illegal picket site
157 a 1	violence

157 a 4	violence
157 a 5	violence
157 a 6	violence
157 a 11	violence
157 a 12	violence
157 a 13	violence
157 a 14	violence
157 a 16	violence
157 b 1	illegal picket site
158 a 3	violence
158 a 9	violence
158 a 10	violence
158 a 12	violence
158 a 13	violence
158 a 14	violence
158 b 1	illegal picket site
158 b 2	roving/moving
159 a 1	violence
159 a 2	violence
159 a 3	violence
159 a 4	violence
159 b 1	illegal picket site
159 b 2	roving/moving
160 a 3	violence
160 b 1	illegal picket site
162 a 5	violence
162 a 7	violence
162 a 8	violence
162 a 9	violence
162 b 1	illegal picket site
162 b 2	roving/moving
163 a	violence
163 b 1	illegal picket site
163 b 2	roving/moving
164 a 1	violence

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164 a 5	violence
164 a 6	violence
164 a 7	violence
164 a 8	violence
164 a 9.1	violence
164 b 1	illegal picket site
164 b 2	roving/moving
165 a 2	violence
165 b 1	illegal picket site
165 b 2	roving/moving
167 a 2 b	violence
167 a 2 c	violence
168 b 1	illegal picket site
168 b 2	roving/moving
169 a 1	violence
169 a 2	violence
169 b 1	illegal picket site
169 b 2	roving/moving
170 b 1	illegal picket site
173 b 2	blocking entrance
173 b 3	picket limitations
173 b 4	picket limitations
173 b 5	roving/moving
173 b 6	seizing plant
174 b 2	blocking entrance
174 b 3	picket limitations
174 b 4	picket limitations
174 b 5	roving/moving
174 b 6	seizing plant
175 b 2	blocking entrance
175 b 3	picket limitations
175 b 4	picket limitations
175 b 5	roving/moving
175 b 6	seizing plant
176 b 2	blocking entrance

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176 b 3	picket limitations
176 b 4	picket limitations
176 b 5	roving/moving
176 b 6	seizing plant
179 a	failure to use all lawful means
179 b	failure to report violations
179 c	failure to make service

For the reasons stated from the bench, the Court defers liquidation of prospective fines on these violations until December 8, 1989, at which time the Court will hear evidence as to the state of compliance with the injunctions.

The Court finds the evidence insufficient to sustain and, therefore, dismisses with prejudice the following specifications: 152 a 1, 152 a 2, 153, 155 a 2, 155 a 4, 156 a 1, 156 a 2, 157 a 1.1, 157 a 3, 157 a 5.1, 157 a 7, 157 a 10, 157 a 17, 158 a 1, 158 a 6, 158 a 7, 158 a 7.1, 158 a 11, 159 a 5, 160 a 2, 160 a 4, 162 a 1, 162 a 4, 162 a 6, 162 a 10, 164 a 3, 164 a 4, 164 a 9.2, 164 a 11, 164 a 12, 165 a 1, 166 a, 167 a 2 a, 168 a 1, 169 a 3, 170 a 1, 170 b 2, 171 b 1, 172 b, 173 a, 173 b 1, 174 b 1, 175 b 1, 176 b 1, 177 b 1, 178 b 1.

The remaining specifications in the Eighth Rule are nonsuited and dismissed without prejudice.

In its Fourth Order Adjudicating Defendant in Contempt, entered September 21, 1989, the Court found the defendant in contempt on specifications 151 b (failure to report violations) and 151 a (failure to make service on its members) but took under advisement what amounts of the prospective fines to liquidate for these violations. For the reasons stated from the bench on October 30, 1989, the Court decides to liquidate no amount for these violations.

The Court has also had under consideration the International's motion to allow picket sites at the Carbo inter-

section. The Carbo picket sites have been established and manned through September 13, 1989, in violation of the Court's injunctions and the evidence shows that the International has committed numerous acts of violence at these locations. The Court therefore denies the International's motion to allow these picket sites. The Court has under advisement what fines to liquidate for these sites in the Eighth Rule, but no further fines will be liquidated for these sites under earlier Rules.

The defendants' motion to dismiss the Eighth Rule, motion for trial by jury, motion for postponement, and motion for recusal are all overruled and denied.

The Clerk shall send attested copies of this Order to counsel of record.

ENTER: this 16th day of November, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen and Objected to:

/s/ Stephen M. Hodges
Counsel for Plaintiffs

/s/ [Illegible]
Counsel for Defendants

VIRGINIA:

In the Circuit Court for the County of Russell on Monday the 6th day of November in the year of our Lord, One thousand nine hundred eighty nine.

Present: The Honorable Donald A. McGlothlin, Jr.,
Judge.

IN CHANCERY NO. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

ORDER

On October 30, 1989, the Court heard arguments of counsel on defendant International Union's Motion to Set Aside Order of [October 9, 1989] as Being Contrary to the Law and Evidence.

Upon consideration of which, the Court announced that said motion was not well founded and should not be granted. It is therefore ORDERED that said motion be, and it is hereby, denied.

ENTER: this 6th day of November, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen:

/s/ Stephen M. Hodges
Counsel for Plaintiffs

Seen and Objected to:

/s/ [Illegible]
Counsel for Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

 IN CHANCERY No. 12,486
CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

 ORDER

On October 3, 1989, the Court heard arguments on defendants' Motion for Recusal.

Upon consideration of which, the Court is of the opinion that said motion was not well founded and should not be granted. It is therefore ORDERED that said motion be, and it is hereby, denied.

ENTER: this 11th day of October, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen:

/s/ Stephen M. Hodges
Counsel for Plaintiffs

Seen and Objected to:

/s/ [Illegible]
Counsel for Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

 In Chancery No. 12,486
CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

 FIFTH ORDER ADJUDICATING DEFENDANT
IN CONTEMPT

On October 4-5, 1989, this matter was before the Court on the remaining specifications of violence in the Seventh Rule to Show Cause issued against defendant International Union, United Mine Workers of America (the International). Following presentation of the evidence and arguments of counsel, the Court announced its decision on October 5, 1989.

Upon consideration, the Court finds that the evidence shows beyond a reasonable doubt that the International is in contempt of Court for the following violations of the Court's injunctions and liquidates the prospective fines previously announced on May 16 and June 2, 1989, as follows:

116 a 3	violence	\$ 100,000
117 a 3	violence	\$ 100,000
117 a 6	violence	\$ 100,000
117 a 7	violence	\$ 100,000
119 a 4	violence	\$ 100,000

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121 a 3	violence	\$ 100,000
122 a 7	violence	\$ 100,000
123 a 6	violence	\$ 100,000
124 a 2	violence	\$ 100,000
125 a 3	violence	\$ 100,000
126 a 4	violence	\$ 100,000
128 a 4	violence	\$ 100,000
129 a 5	violence	\$ 100,000
129 a 7, a 9	violence	\$ 100,000
130 a 1	violence	\$ 100,000
130 a 4	violence	\$ 100,000
130 a 5	violence	\$ 100,000
130 a 8	violence	\$ 100,000
131 a 1	violence	\$ 100,000
131 a 4	violence	\$ 100,000
131 a 5	violence	\$ 100,000
131 a 6	violence	\$ 100,000
132 a 1	violence	\$ 100,000
132 a 7	violence	\$ 100,000
133 a 1	violence	\$ 100,000
133 a 2	violence	\$ 100,000
133 a 8	violence	\$ 100,000
133 a 11	violence	\$ 100,000
135 a 3	violence	\$ 100,000
137 a 3	violence	\$ 100,000
139 a 1	violence	\$ 100,000
141 a 4	violence	\$ 100,000
142 a 1	violence	\$ 100,000
142 a 2	violence	\$ 100,000
142 a 3	violence	\$ 100,000
142 a 4	violence	\$ 100,000
142 a 7	violence	\$ 100,000
142 a 8	violence	\$ 100,000
142 a 12, a 13, a 14	violence	\$ 100,000

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142 a 16	violence	\$ 100,000
144 a 3	violence	\$ 100,000
144 a 5	violence	\$ 100,000
144 a 6	violence	\$ 100,000
144 a 9	violence	\$ 100,000
144 a 12	violence	\$ 100,000
144 a 14	violence	\$ 100,000
144 a 15	violence	\$ 100,000
144 a 16	violence	\$ 100,000
144 a 19	violence	\$ 100,000
144 a 22	violence	\$ 100,000
144 a 23	violence	\$ 100,000
144 a 25	violence	\$ 100,000
145 a 3	violence	\$ 100,000
145 a 4	violence	\$ 100,000
145 a 6	violence	\$ 100,000
146 a 1	violence	\$ 100,000
146 a 5	violence	\$ 100,000
147 a 3	violence	\$ 100,000
147 a 5, a 6, a 7	violence	\$ 500,000
147 a 8	violence	\$ 100,000
147 a 9	violence	\$ 100,000
147 a 10	violence	\$ 100,000
147 a 12	violence	\$ 100,000
149	violence	\$ 100,000
TOTAL		\$6,900,000

The Court also finds that the evidence sustains specification 130 a 2 but, for the reasons stated from the bench, the Court liquidates no amount for this violation.

The Court finds the evidence insufficient to sustain the following specifications: 117 a 4, 119 a 2, 122 a 2, 123 a 5, 123 a 7, 126 a 1, 127 a 1, 128 a 3, 129 a 6, 130 a 3, 145 a 5, and 146 a 3. All remaining specifications in the Seventh Rule not adjudicated above or by prior

Orders are dismissed with prejudice without objection from plaintiffs.

It is ORDERED that the International shall pay the foregoing \$6,900,000 in fines to the Clerk of this Court by 5:00 p.m., October 13, 1989, as follows:

\$2,500,000 to the Clerk of this Court for
the Commonwealth of Virginia;

\$1,200,000 to the Clerk of this Court for
Dickenson County, Virginia;

\$1,400,000 to the Clerk of this Court for
Clinchfield Coal Company.

The following individuals, International officers and members of the International's Executive Board, are ORDERED to take all actions necessary to effect payment of the foregoing \$6,900,000 in fines by the date and time stated above:

Richard L. Trumka
Cecil E. Roberts
John J. Banovic
Tommy E. Buchanan
Robert Burchell
Charles Dixon
Larry Joe Draper
Howard L. Green
Anthony Grajeda
Stuart L. Johnson
Daniel J. Kane
Anthony R. Kujawa
Lyle McGowan
Roger T. Myers
Jerome Neal
Walter E. Oviatt

Cecil M. Partin
William C. Ray
Thomas J. Shumaker
Jimmy H. Smith
Jackie Stump
C. Danny Surface
Stephen F. Webber

It is further ORDERED that counsel for the International shall immediately cause a copy of this Order to be served personally on each of the foregoing individuals and mailed to them certified mail, return receipt requested, restricted delivery. The returns of such service and the return receipts for mailing shall be immediately filed with the Clerk of this Court. The International shall also immediately file the returns of service and the return receipts for mailing required for said individuals under the Court's Fourth Order Adjudicating Defendant in Contempt, entered September 21, 1989.

It is further ORDERED that this Order and the Court's Fourth Order Adjudicating Defendant in Contempt, entered September 21, 1989, be read in full at each and every meeting of the International's officers and at each and every meeting of the International's Executive Board, until all outstanding fines are either properly bonded or paid in full, and an affidavit of each such reading shall be immediately filed with the Clerk by an appropriate officer or Board member.

In view of the defendant's contempt, the refusal of defendant to pay or bond fines previously ordered, the defendant's judgments, the necessity for speedy action to make this Order effective, and for good cause shown, it is further ORDERED that execution shall issue on or after 5:01 p.m., October 13, 1989, as to all unpaid or unbonded fines liquidated by this Order.

ENTER: this 9th day of October, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen:

/s/ Stephen M. Hodges
Counsel for Plaintiffs

Seen and Objected to:

/s/ James Haviland
Counsel for International

/s/ James J. Vergara Jr.
Counsel for District 28
and Other Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs
v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendant

HEARING

[Filed Dec. 5, 1989]

The following hearing was taken at 9:00 a.m. on October 5, 1989 in the Circuit Court of Russell County with The Honorable Donald McGlothlin Jr.

PRESENT:

Steve Hodges, Esquire
Wade Massie, Esquire
Counsels for Plaintiff

James Haviland, Esquire
Bill Shults, Esquire
James Vergara, Esquire
Counsels for Defendants

* * * *

[4172] THE COURT: Ladies and Gentlemen, The Court has considered the evidence and argument of counsel and based upon those, makes the following findings: The Court finds that the evidence establishes beyond reasonable doubt that the Defendant, the International Union, UMWA, is guilty of 71 violations involving violence of The Court's previous orders. The Court finds the following specifications have been proven beyond reasonable doubt. Those allegations and specifications [4173] Paragraph 116 A3; 117 A3, 6 and 7; 119 A4;

121 A3; 122 A7; 123 A6; 124 A2; 125 A3; 126 A4; 128 A4; 129 A5, 7 and 9; 130 A1, 2, 4, 5 and 8; 131 A1, 4, 5 and 6; 132 A1 and 7; 133 A1, 2, 8 and 11; 135 A3 and 4; 137 A3; 139 A1; 141 A4; 142 A1, 2, 3, 4, 7, 8, 12, 13, 14 and 16; 144 A3, 5, 6, 9, 12, 14, 15, 16, 19, 22, 23 and 25; 145 A3, 4 and 6; 146 A1 and 5; 147 A3, 5, 6, 7, 8, 9, 10 and 12; and the specification contained in Paragraph 149. The Court finds that the proof is insufficient and finds the Defendant not guilty of the following specifications: Paragraph 117 A4; Paragraph 119 A2; 122 A2; 123 A5 and 7; 126 A1; 127 A1; 128 A3; 129 A6; 130 A3; 145 A5; and 146 A3. That is a total of 12 specifications that The Court has found the Defendant not guilty of. The other several allegations and specifications have previously been ruled on in prior hearings or earlier in this hearing. The Court will impose and liquidate the following minimum civil penalties on each of the violations except as noted in just a moment. Except the allegations contained in Paragraphs 129 A 7 and 9; Paragraph 130 A2; Paragraphs 142 A12, 13 and 14; and Paragraphs 147 A5, 6 and 7; The Court liquidates a \$100,000.00 minimum civil penalty for each of the other violations. For the violations found in Paragraphs 129 A7 and 9, The Court liquidates a \$100,000.00 penalty total for the two, considering that those two are basically one [4174] incident. For Paragraph 130 A2, The Court liquidates no penalty in this hearing as it feels this violation is part and parcel of the same incident which occurred and is set forth in Paragraph 130 A11 as involving Mr. Morris Barton or "Moose" Barton and there has already been a penalty liquidated for that. In Paragraphs 142 A12, 13 and 14, The Court liquidates a total of a \$100,000.00 penalty considering, The Court considers those three violations to be basically one incident. In Paragraph 147 A5, 6 and 7, again The Court considers these to be the same incident, however, The Court feels that the evidence showed a vicious attack, a gorilla attack on three individuals who were working at one of the Plaintiff's facilities, I believe,

it was the Lambert Fork Mine, Lamber Fork Number 2 mine. These were the incidents you will recall which occurred on Route 63, just outside of or between Sun and St. Paul, Virginia. I believe it was near the Hanging Rock Clinic was the testimony. The Court feels that due to the aggravated nature of these incidents that a \$500,000.00 penalty should be liquidated and will so order. Now, The Court's calculations, the total penalties liquidated come to \$6,000,900,000.00. They will be paid as follows: \$2,000,500,000.00 to the Commonwealth of Virginia; \$1,000,800,000.00 to Russell County, Virginia; \$1,000,200,000.00 to Dickenson County, Virginia; and [4175] \$1,000,400,000.00 to Clinchfield Coal Company. All fines or liquidated penalties will be due and payable no later than 5:00 p.m. October 13, 1989, to the Clerk of This Court, payable here at the Russell County Courthouse. The following officers of the Defendant, International Union, UMWA, are specifically ordered to take all actions necessary to effect the payment previously ordered; Richard Trumka, Cecil Roberts, John Banivick and each individual member of the Defendant's International Executive Board. The Court will further order that each of these individuals be served with a copy of the Order which commemorates this ruling immediately by personal service and by Certified Mail—Return Receipt Requested, Restricted Delivery and in addition, by delivery by Counsel for the Defendant to each of these individuals with Counsel's certification upon completing of this delivery. The Court will further order that this Order and, gentlemen, you will have to assist The Court, was the last Order entered September 21?

MR. HAVILAND: I believe that is correct, Your Honor.

THE COURT: All right. The order commemorating this ruling and the Order that was entered September 21, shall be read at all meetings of any of the executive officers, executive Board members and/or the [4176] three

executives, the President, Vice President and Secretary/Treasurer which might occur in the future. In other words, both of these Orders will be read in their entirety to those gentlemen when they meet at any time. Is there any question about The Court's ruling? I am sorry, I have neglected one further thing. The Court further orders that the Special Commissioners which have previously been appointed, Mr. Hodges and Mr. Massie, shall take all the necessary action to collect the liquidated penalties amounts today. If they are not paid on or before the time stated, unless The Court enters an Order staying, This Court or another Court of competent jurisdiction enters a Court staying that action. Now, gentlemen, is there any question?

MR. HAVILAND: Your Honor, was the due date October 15?

THE COURT: The 13th, Friday, October 13th at five o'clock. That is five business days as I count them.

MR. HODGES: No questions, Your Honor.

THE COURT: All right, Ladies and Gentlemen, I believe that we have an additional set of hearings beginning later this month, October 23 and 24th, so I suppose The Court will see all of the parties, or the Counsel at least at that time. Court will be adjourned.

[4177] MR. SHULTS: Your Honor?

THE COURTS: Yes, sir.

MR. SHULTS: We had filed a motion to reconsider on, regarding the September 21 Order—

THE COURT: Be seated Ladies and Gentlemen.

MR. SHULTS: Sorry, we would just like to take that up within 21 days, when would The Court entertain us on that?

THE COURT: Well, why don't we go ahead, I have to get The Court's calendar, which is in Chambers, if you would just meet me in Chambers, we will try to set up a hearing date for that. We will be adjourned.

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

In Chancery No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

ORDER

On request of the Special Commissioners, Stephen M. Hodges and Wade W. Massie, and for good cause shown, it is ORDERED that the Special Commissioners be, and they are hereby authorized:

- (1) to employ counsel and accountants in the District of Columbia to assign them in the collection of the outstanding fines in this matter;
- (2) to employ accountants in Virginia to assist them in the collection of the outstanding fines in this matter.

The fees of said counsel and accountants may be paid by the Special Commissioners out of the proceeds of the fines collected prior to deposit of said fines with the Clerk. If, within 30 days after notice of payment of said fees and expenses, any party in interest objects to the reasonableness of the amounts paid, the Court will schedule a hearing on such matter, determine the issue, and take such action as it may deem appropriate under the cir-

cumstances. Endorsement by counsel for District 28 is dispensed with.

ENTER: this 29th day of September, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

/s/ Stephen M. Hodges
STEPHEN M. HODGES
Special Commissioner

/s/ Wade W. Massie
WADE W. MASSIE
Special Commissioner

Seen

/s/ Stephen M. Hodges
Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

In Chancery

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

FOURTH ORDER ADJUDICATING
DEFENDANT IN CONTEMPT

On September 13-14, 1989, this matter was before the Court on the specifications of nonviolence contained in the Seventh Rule to Show Cause and Supplemental Rule to Show Cause previously issued against defendant International Union, United Mine Workers of America (the International), as well as 40 specifications of violence in the Seventh Rule designated for hearing on those days.

Upon consideration of which, for the reasons stated from the bench on September 18 and 19, 1989, the Court finds that the evidence shows beyond a reasonable doubt that the International is in contempt of Court for the following violations of the Court's injunctions and liquidates the prospective fines previously announced on May 16 and June 2, 1989, as follows:

115 a 3	violence	\$ 100,000
116 a 1	violence	\$ 100,000
117 a 1	violence	\$ 100,000
117 a 8	violence	\$ 100,000

84a

121 a 1	violence	\$ 100,000
122 a 3	violence	\$ 100,000
123 a 4	violence	\$ 100,000
125 a 2	violence	\$ 100,000
126 a 3	violence	\$ 100,000
127 a 2	violence	\$ 100,000
128 a 2	violence	\$ 100,000
129 a 3	violence	\$ 500,000
130 a 9	violence	\$ 100,000
130 a 10	violence	\$ 100,000
131 a 8	violence	\$ 500,000
132 a 5	violence	\$ 100,000
133 a 12	violence	\$ 100,000
135 a 1	violence	\$ 100,000
136 a 1	violence	\$ 100,000
137 a 4	violence	\$ 100,000
140 a 3	violence	\$ 100,000
141 a 1	violence	\$ 100,000
142 a 5	violence	\$ 100,000
144 a 18	violence	\$ 100,000
144 a 24	violence	\$ 100,000
145 a 1	violence	\$ 100,000
145 a 2	violence	\$ 100,000
146 a 2	violence	\$ 100,000
—	violence	\$ 500,000
147 a 11	violence	\$ 100,000
150	violence	\$ 100,000
118 b 2	roving	\$ 200,000
119 b 2	roving	\$ 200,000
121 b 2	roving	\$ 200,000
122 b 2	roving	\$ 200,000
123 b 2	roving	\$ 200,000
124 b 2	roving	\$ 200,000
125 b 2	roving	\$ 200,000
126 b 2	roving	\$ 200,000

85a

127 b 2	roving	\$ 200,000
128 b 2	roving	\$ 200,000
129 b 2	roving	\$ 200,000
130 b 2, b 4	roving, blocking, excessive numbers	\$ 500,000
131 b 2	roving	\$ 500,000
132 b 2	roving	\$ 500,000
133 b 2	roving	\$ 500,000
135 b 2	roving	\$ 500,000
137 b 2	roving	\$ 500,000
138 b 2	roving	\$ 500,000
140 b 2	roving	\$ 500,000
142 b 2, b 4	roving, blocking	\$ 500,000
144 b 2	roving	\$ 500,000
146 b 2	roving	\$ 500,000
147 b 2	roving	\$ 500,000
151 a 1	failure to use all lawful means	\$ 1,000,000
TOTAL:		\$13,500,000

It is further ORDERED that the International shall pay the foregoing \$13,500,000 in fines by 5:00 p.m. on September 26, 1989, as follows:

\$6,000,000 to the Clerk of this Court for
the Commonwealth of Virginia;

— \$4,500,000 to the Clerk of this Court for
Russell County, Virginia;

\$3,000,000 to the Clerk of this Court for
Dickenson County, Virginia.

The Court also finds beyond a reasonable doubt that the International is in contempt of Court as stated in specifications 151 b, failure to report violations, and 151 c, failure to make service on its members, but takes under advisement the question of what amounts of the prospective fines to liquidate for said violations. The

Court also takes under advisement the specifications relating to unauthorized picket shacks.

On September 18-19, 1989, this matter was before the Court on an additional 60 specifications of violence in the Seventh Rule previously designated for hearing on those days. Whereupon, at the request of plaintiffs, the Court continued 12 specifications (116 a 3, 119 a 2, 122 a 2, 132 a 1, 133 a 1, 142 a 2, 142 a 3, 142 a 4, 144 a 5, 144 a 14, 144 a 25, and 149) until October 4-5, 1989, conditioned upon a showing that the witnesses were detained because of strike action and, at the request of plaintiffs, dismissed 4 specifications (115 a 5, 123 a 1, 131 a 2, and 142 a 17).

Upon consideration of the remainder of the 60 designated specifications, the Court finds that the evidence shows beyond a reasonable doubt that the International is in contempt of Court for the following violations of the Court's injunctions and liquidates the prospective fines previously announced on May 16 and June 2, 1989, as follows:

114 a 1	violence	\$ 100,000
114 a 2	violence	\$ 100,000
115 a 1	violence	\$ 100,000
115 a 2	violence	\$ 100,000
115 a 4	violence	\$ 100,000
116 a 2	violence	\$ 100,000
116 a 4	violence	\$ 100,000
122 a 1	violence	\$ 100,000
122 a 5	violence	\$ 100,000
128 a 1	violence	\$ 100,000
129 a 1	violence	\$ 100,000
129 a 2	violence	\$ 100,000
129 a 4	violence	\$ 100,000
129 a 8	violence	\$ 100,000
130 a 7	violence	\$ 100,000

130 a 11	violence	\$ 100,000
131 a 3	violence	\$ 100,000
132 a 3	violence	\$ 100,000
132 a 4	violence	\$ 100,000
132 a 6	violence	\$ 100,000
133 a 5	violence	\$ 100,000
133 a 10	violence	\$ 100,000
138 a 1	violence	\$ 100,000
138 a 2	violence	\$ 100,000
140 a 2	violence	\$ 100,000
140 a 4	violence	\$ 100,000
141 a 3	violence	\$ 100,000
141 a 5	violence	\$ 100,000
142 a 9	violence	\$ 100,000
144 a 1	violence	\$ 100,000
144 a 2	violence	\$ 100,000
144 a 4	violence	\$ 100,000
144 a 17	violence	\$ 100,000
144 a 21	violence	\$ 100,000
TOTAL:		\$3,400,000

It is further ORDERED that the International shall pay the foregoing \$3,400,000 in fines to the Clerk of the Court for Clinchfield Coal Company, by 5:00 p.m. September 26, 1989.

It appearing to the Court that the defendants have not paid any of the previously liquidated fines, and the defendants advising the Court that no efforts are foreseen to effect payment of such fines, it is therefore FURTHER ORDERED that Stephen M. Hodges and Wade W. Massie, either of whom may act, be, and they are hereby, appointed special commissioners by the Court to collect all fines liquidated by Orders entered on or after July 27, 1989, including all fines liquidated by this Order, on behalf of the respective judgment creditors. Said special commissioners are directed to proceed immediately

to collect all such fines and are authorized and empowered to undertake all necessary or convenient means of collection, including, but not limited to, docketing, interrogatories, levy, execution, garnishment, attachment, and creditor's bill, wherever the defendants may have property or assets, until all such fines are paid in full. In addition, said special commissioners upon petition to the Court for leave so to do shall have the power to employ counsel and accountants to assist them in their work. All fines collected shall be paid to the Clerk of this Court and distributed by the Court.

The following individuals, International officers and members of the International's Executive Board, are ORDERED to take all actions necessary to effect the payment of all fines liquidated by Orders entered on or after July 27, 1989, against International Union, United Mine Workers of America, including all fines liquidated by this Order, no later than 5:00 p.m. September 26, 1989:

Richard L. Trumka
 Cecil E. Roberts
 John J. Banovic
 Tommy E. Buchanan
 Robert Burchell
 Charles Dixon
 Larry Joe Draper
 Howard L. Green
 Anthony Grajeda
 Stuart L. Johnson
 Daniel J. Kane
 Anthony R. Kujawa
 Lyle McGowan
 Roger T. Myers
 Jerome Neal
 Walter E. Oviatt

Cecil M. Partin
 William C. Ray
 James Russell
 Thomas J. Shumaker
 Jimmy H. Smith
 Jackie Stump
 C. Danny Surface
 Stephen F. Webber

For good cause it is ORDERED that execution shall issue on September 27, 1989, as to all fines liquidated by this Order which have not been paid in full to the Clerk by 5:00 p.m. September 26, 1989.

The International shall immediately cause a copy of this Order to be served personally on each of the foregoing individual members and mailed to them certified mail, return receipt requested, restricted delivery.

ENTER: this 21st day of September, 1989.

/s/ Donald A. McGlothlin, Jr.
 Judge

Seen:

/s/ Stephen M. Hodges
 Counsel for Plaintiffs

Seen and Objected to:

/s/ William D. Holtz
 Counsel for International

/s/ James J. Vergara Jr.
 Counsel for District 28
 and Other Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et als.*,
Plaintiffs,

vs.

THE INTERNATIONAL UNION, UMWA, and
DISTRICT 28, UMWA,
Defendants.

COURT'S RULING

July 27, 1989

[Filed Sep. 21, 1989]

APPEARANCES:

STEPHEN M. HODGES, Esquire, Abingdon, Virginia;
WADE W. MASSIE, Esquire, Abingdon, Virginia; and
KARL KINDIG, Esquire, House Counsel, Lebanon,
Virginia,

Counsel for Plaintiffs.

JAMES M. HAVILAND, Esquire, Charleston, West Vir-
ginia, and MICHAEL J. PASSINO, Esquire, Nashville,
Tennessee,

Counsel for International, UMWA.

[2] COURT'S RULING

The Honorable Donald A. McGlothlin, Jr., Judge of the Twenty-Ninth Judicial Circuit, sitting at Lebanon, rendered the following opinion in the above styled cause on the 27th day of July, 1989.

The court reporter, Alice R. Gordon, was duly sworn.

THE COURT: Thank you, gentlemen. I first want to say that, although counsel have tried to demean their own, their brief and their argument, I think they have done a very fine job of exploring the issue, and I have read your cases, and I agree with you that there are no cases at least that were cited to the court or the court could find in its research that speak to this type of a fact situation.

However, the court is convinced on reading the cases that the Supreme Court's reasoning and languages in the *Wisconsin Employment Board* case when it says that the individual state courts have a, or states, individual states, have an overriding interest in enforcing and maintaining peace in the public sector, that when they say that, that they mean that, and I don't, I cannot imagine a situation when the mere issuance of an injunction or the beginning of proceedings by any federal tribunal or any federal agency could take away from the state that responsibility to its [3] citizens. And I think that that is exactly what that case is trying to impart, that the Commonwealth of Virginia in this particular case has a vital interest in what happens in the state as far as possible violent acts toward its citizens that it has as a result of the social contract with its citizens, a duty to enforce peace or to try to maintain peace.

And, therefore, I am going to overrule the motion to dismiss this sixth rule. I don't think that this court, especially, well, I'll just, I'll just tell you, I find that the plaintiffs have shown that the defendants and their members have engaged in acts of violence that are directly related to their picketing in this labor dispute and that they have been characterized by mass picketing and blocking of

rights of ways, both public and private; the hurling of rocks and other missiles at vehicles; using public highways in the presence of and while the general motoring public are using those highways; and that, beyond that, that these members have intimidated or attempted to intimidate by threats and by violence members of this community who are attempting to exercise their right to go to work and make a living under the Virginia law.

And I don't think that this court can shirk from this responsibility, and I do not feel that the [4] Section 10-J injunction protects the rights of the Virginia citizens. That injunction is designed, in this court's opinion, to enforce the National Labor Relations Act and its purposes.

This court's injunction is designed to keep the peace here in Virginia and to be sure that it's, that the citizens of this state, in these communities, can live in peace, free from the acts of terror which have been committed upon this community.

I want to make one more comment so that the record will be clear, and I am not taking your argument, Mr. Passino, in any manner as any threat on behalf of your clients but, simply, as a recognition of facts that do exist with regard to these wildcat strikes.

The court has considered the fact that shortly after this court announced very substantial fines against the union, and very shortly, I think, perhaps, the next working day over the weekend, Judge Williams in the Federal District Court announced the incarceration of three of the union leaders for violation of that court's injunction, that there were, I guess we'll call them wildcat strikes or strikes that were supposedly unauthorized by the International union, that were also supposedly in support of the strike that has been authorized here in Virginia and Kentucky [5] and West Virginia against the Pittston Coal Group and its subsidiaries, but after having thought about these acts and their consequences, the court has deter-

mined that it cannot and will not be affected by what happens as a result of its decisions.

To do that would be to bow to pressure. Some people would call it extortion by, not necessarily by the parties that are before this court but, certainly, by some of their members, and it just cannot be tolerated.

Therefore, I have not allowed those facts, that argument, to affect what this court has done in any manner.

All right. With regard to the factual findings, in the fifth rule to show cause, the court finds that the plaintiffs have shown beyond reasonable doubt, although I am certainly not sure that that is the standard of proof, but there is no question, I am willing to say this, the court has applied that burden of proof out of an abundance of caution and trying to be fair to the defendants, but the court finds beyond a reasonable doubt that the following allegations have been proved.

The allegation in paragraph 64.vv concerning rocks being thrown at a vehicle driven by Dennis Yokum on May the 17th;

[6] The allegations in 64.xx concerning rocks being thrown at a vehicle driven by Jamie Justus on May 18;

The allegations in paragraph 64.yy concerning rocks being thrown at Marty Justus or at the vehicle he was operating on May 18th;

The allegations in paragraph 64.zz involving pellets that were propelled, shot at a vehicle at the Moss 3 scale house on May 18th;

Allegations in 64.ddd concerning ball bearing being propelled at the vehicle being driven by James Blackburn on May 24th;

The allegations contained in paragraph 64.ggg concerning an assault upon Marty on Justus on. I'm sorry, on June the 1st;

The allegations in paragraph 75 concerning putting the devices known as jack rocks out and threatening of Carl K. Wallace. I believe that was a nighttime incident as he was getting off work on May the 17th;

And the allegations contained in paragraph 78 concerning following Mr. Jerry Simon in a threatening manner and use of a gun in that episode on May the 24th.

For each of these violations the court will liquidate the previously imposed prospective civil penalties in the sum of \$100,000 per occurrence.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

In Chancery No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

ORDER DENYING POST-TRIAL MOTIONS AND
AMENDING ORDER OF JULY 27, 1989

On August 16, 1989, plaintiffs and International Union, United Mine Workers of America ("International") appeared by counsel on the following motions:

- (1) The union's Motion to Set Aside Order of July 27, 1989 as Being Contrary to the Law and Evidence.
- (2) The union's Motion for Modification of July 27, 1989 Order.
- (3) Plaintiff's Motion to Amend Order of July 27, 1989.

Counsel for District 28 could not be present but authorized counsel for International to proceed on behalf of District 28 and agreed that the hearing should proceed in his absence.

Upon consideration of the arguments of counsel and a review of the evidence, it appearing proper, it is ORDERED that each of the three motions under consideration be and are hereby denied.

It appearing that the July 27, 1989 Order contains two errors, it is hereby amended, without objection, as follows:

Under "Fifth Rule"

"64dd" is amended to read "64vv."

Under "Sixth Rule"

The word "violence" beside the number 87a is amended to read "roving."

The endorsement of this order by counsel for District 28 is hereby dispensed with.

Each party objected to the Court's rulings to the extent adverse.

Seen:

/s/ William O. Shults
WILLIAM O. SHULTS
Counsel for International Union,
United Mine Workers of America

/s/ Stephen M. Hodges
STEPHEN M. HODGES
Counsel for Plaintiffs

ENTER, this 17th day of August, 1989.

/s/ Donald A. McGlothlin, Jr.
Circuit Judge

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

In Chancery

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,
vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

THIRD ORDER ADJUDICATING DEFENDANTS
IN CONTEMPT

On July 19-21, 1989, this matter was before the Court on the Fifth and Sixth Rules to Show Cause heretofore issued against defendants International Union, United Mine Workers of America (International), and District 28, United Mine Workers of America (District 28). Following presentation of the evidence and arguments of counsel, the Court took the case under advisement, announcing its rulings on July 27, 1989.

Upon consideration of which, the Court finds that the evidence shows beyond a reasonable doubt that the defendants are in contempt of Court for the following violations of the Court's injunctions and liquidates a portion of the prospective fines previously announced on May 16 and June 2, 1989, as follows:

FIFTH RULE

64dd	—violence	\$ 100,000
64xx	—violence	\$ 100,000
64yy	—violence	\$ 100,000
64zz	—violence	\$ 100,000
64ddd	—violence	\$ 100,000

98a

64ggg	—violence	\$ 100,000
75	—violence	\$ 100,000
78	—violence	\$ 100,000

SIXTH RULE

81a,b	—picket limitations	\$ 20,000
82	—use of mirror	\$ 5,000
83a,b,e	—picket limitations	\$ 20,000
84a,b	—picket limitations	\$ 20,000
85b	—violence	\$ 100,000
86b	—picket limitations	\$ 20,000
87a	—violence	\$ 100,000
89a	—violence	\$ 100,000
90a	—violence	\$ 100,000
91c,d	—violence	\$ 100,000
92a	—roving	\$ 100,000
92b	—violence	\$ 100,000
94b	—violence	\$ 100,000
94c	—roving	\$ 100,000
95	—roving	\$ 100,000
97	—violence	\$ 100,000
98a	—roving	\$ 100,000
99a	—roving	\$ 100,000
99f	—violence	\$ 100,000
100a	—roving	\$ 100,000
100d	—violence	\$ 100,000
101a	—roving	\$ 100,000
102a	—roving	\$ 100,000

99a

102c	—violence	\$ 100,000
103a	—roving	\$ 100,000
104a	—roving	\$ 100,000
104c	—violence	\$ 100,000
104d	—violence	\$ 100,000
105a	—roving	\$ 100,000
105c	—violence	\$ 100,000
106a	—roving	\$ 100,000
107a	—roving	\$ 100,000
108a	—roving	\$ 100,000
109a	—roving	\$ 100,000
110a	—picket site	\$ 20,000
110b	—picket site	\$ 20,000
111	—failure to report violations	\$ 140,000
112	—failure to use all lawful means to insure compliance	\$ 500,000

TOTAL

\$4,465,000

The foregoing fines are assessed against International and District 28 jointly and severally and shall be paid as follows within 15 days:

\$2,000,000 to the Clerk of this Court for the Commonwealth of Virginia

\$1,465,000 to the Treasurer of Russell County, Virginia

\$1,000,000 to the Treasurer of Dickenson County, Virginia

It is further ORDERED that the Court's injunctions be, and they are hereby, supplemented as follows: International and District 28, and their officers, members,

agents, servants, employees, and those acting in association or concert with them, are enjoined from blocking or impeding by any means, motor traffic or otherwise, access to any facility of plaintiffs or their contractors, and they are also enjoined from blocking or impeding movement on any highway or private way used by plaintiffs or plaintiffs' contractors or by any of their employees or others providing goods or services.

It is further ORDERED that within 10 days District 28 shall cause a copy of this Order to be served on each and every of its members.

It is further ORDERED that within 10 days International shall cause the following papers to be served on each and every of its members:

1. The Court's Amended Injunction of April 21, 1989;
2. The Court's Order of May 18, 1989, adjudicating defendants in contempt; and
3. The Court's Order of June 7, 1989, adjudicating defendants in contempt; and
4. This Order.

Upon consideration of the briefs and arguments of counsel, the Court being of the opinion that the defendants' motion to dismiss the Sixth Rule is not well-founded, it is ORDERED that said motion be, and it is hereby, overruled.

All prior pronouncements of prospective fines shall remain in full force and effect and shall apply to the injunctions as supplemented herein.

Defendants object to this Order. Plaintiffs object to the fines not being paid to them.

ENTER: this 27th day of July, 1989.

/s/ Donald A. McGlothlin, Jr.
Judge

Seen:

/s/ Stephen H. Hodges
Counsel for Plaintiffs

/s/ James M. Haviland
Counsel for International

/s/ James Vergara/J.M.H.
Counsel for District 28 and
Other Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

In Chancery

CLINCHFIELD COAL COMPANY, *et al*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al*,
Defendants.SECOND ORDER ADJUDICATING DEFENDANTS
IN CONTEMPT

On June 2, 1989, this matter was before the Court on Rules to Show Cause issued by the Clerk of this Court against defendants International Union, United Mine Workers of America ("International") and District 28, United Mine Workers of America ("District") on May 26, 1989.

Whereupon, testimony and other evidence was presented in support of the allegations in the Rules. The Court heard arguments of counsel.

Upon the evidence presented and the arguments of counsel, the Court finds that the evidence proves beyond a reasonable doubt that International and District have intentionally violated the Court's Injunction entered April 13, 1989 and Amended Injunction entered April 21, 1989 in every respect set forth in the Rules dated May 26, 1989 and are in contempt of this Court for such violations, except that the Court finds no violations on May 15 at McClure Mine and Plant and the Court is

not considering any violation with respect to the service requirements contained in its May 18 Order.

The Court further specifically finds that International and District have not complied with the Court's injunctions since the entry of the Court's Order of May 18, 1989.

Upon the said findings, it is ADJUDGED, ORDERED and DECREED as follows:

1. The following fines are hereby imposed against International and District for violations of the Court's injunctions on the dates indicated:

a. May 17, 1989:	
International	\$ 20,000.00
District	\$ 20,000.00
b. May 18, 1989:	
International	\$ 50,000.00
District	\$ 50,000.00
c. May 19, 1989:	
International	\$150,000.00
District	\$ 75,000.00
d. May 22, 1989:	
International	\$250,000.00
District	\$100,000.00
e. May 23, 1989:	
International	\$250,000.00
District	\$100,000.00
f. May 24, 1989:	
International	\$500,000.00
District	\$200,000.00
g. May 25, 1989:	
International	\$500,000.00
District	\$200,000.00

The totals of fines imposed hereby are:

International	\$1,720,000.00
District	\$ 745,000.00

2. All fines imposed hereby represent liquidation of the prospective fines announced by the Court's Order of May 18, 1989. It is the Court's intention that these fines are civil and coercive.

It appearing to the Court that the Commonwealth of Virginia has at great cost supplied numerous officers of the Virginia State Police and other state personnel, large amounts of equipment and supplies, and has gone to great effort, all in an attempt to keep the peace and enforce the rights of plaintiffs and their employees and contractors with regard to the labor dispute between the parties to this action; and it further appearing that both defendants, by counsel, have expressed their objection to any part of the fines being payable to plaintiffs and argue to the contrary that all fines assessed should be payable to the Commonwealth; and it further appearing proper under all the circumstances of the case, the Court ORDERS that all fines imposed by this Order shall be payable to the Commonwealth of Virginia c/o the Clerk of this Court within 15 days of the date of this Order. Plaintiffs objected to that portion of this Order which orders the civil contempt fines payable to the Commonwealth, it being their position that such fines should be paid to them.

3. The Court defers and takes under advisement the revocation of the suspension of portions of the fines announced in the Court's Order of May 18, 1989 and the sanctions, if any, for contempts committed on May 8, 11, 12, 15 and 16, 1989.

4. For any non-violent violations of the Injunction or the Amended Injunction which occur on or after June 5, 1989, the following prospective civil contempt fines will

be imposed for the purpose of coercing the defendants to comply with the Court's injunctions:

a. For the first day upon which any violation occurs:

International	\$ 500,000.00
District	\$ 200,000.00

b. For the second day upon which any violation occurs:

International	\$1,000,000.00
District	\$ 400,000.00

c. For the third day upon which any violation occurs:

International	\$2,000,000.00
District	\$ 800,000.00

d. For the fourth and all subsequent days upon which any violation occurs the respective fines against International and District will double each day, without limitation.

5. International and District will file with this Court on or before 5:00 p.m., June 6, 1989, a list of all U.M.W.A. members residing in this Commonwealth and shall tender a check sufficient to pay the costs for service on each such member a copy of each of the following documents:

a. The Court's Amended Injunction dated April 21, 1989.

b. This Order.

In addition to the foregoing, the U.M.W.A. membership is advised that the Court's Order of May 18, 1989, has specified a \$100,000 minimum civil fine against International, District, and its members for each instance of a violent violation of the Court's injunctions.

Said Sheriffs shall make service on such members without delay and make their returns to this Court.

6. International and District are ordered and enjoined to post, conspicuously at each of the 17 picket locations designated below, a list of the names of each person

assigned to picket at that site on that day and the hours or shift, if shifts are specified, that each person is permitted to be at the site. In the event that any picket, observer or associate of pickets shall appear at a picket site whose name is not on the list, the picket captain shall notify him of his violation of this Order, shall order him to leave immediately, and if he shall fail to leave, the picket captain shall report the violation to a Virginia State Police officer on duty at the site. If the police officer on duty observes numbers of persons present in excess of the limitation stated in this Order, or if violations are reported by a picket captain, the State Police officer shall notify any such person that he is in violation of this Order and he shall be ordered to leave.

In the event such person fails to leave immediately, a report of that fact will be made to this Court by affidavit of the Virginia State Police officer, sworn before any person authorized by law to administer oath, and a rule shall be issued for the individual to show cause why he should not be held in contempt of this Court for violating this Order. If the person is found to be in violation, the Court will impose a fine and jail term as appropriate.

It shall be sufficient for the officer of the Virginia State Police to prepare a single affidavit at the end of each day setting forth the identity of each person at a picket site who is alleged to be in violation of this Order.

If any person at a picket site shall refuse to identify himself to the picket captain or a Virginia State Police officer upon request, the officer shall advise such person that his refusal violates this Court's order.

The Amended Injunction is hereby further amended to allow at each picket site designated below the following number of pickets, observers or associates of pickets:

	<u>No. of Persons Allowed</u>
1. Headquarters	30
2. Moss No. 3	20

3. Central Shop	8
4. Laurel Mountain	12
5. Yowling Branch	8
6. Lambert Fork	20
7. Dante Office	20
8. Old Smith Gap	20
9. Banner Dock	8
10. McClure Mine	20
11. McClure Preparation Plant	20
12. Maple House	12
13. Open Fork No. 2	8
14. Kilgore Creek	8
15. Triple C	12
16. Splashdam Portal	20
17. Splashdam Loadout	20

Due notice of presentation of this Order for entry was given to counsel for District who, by agreement, presented his arguments by telephone and who objected to the rulings of the Court except as previously stated herein. Endorsement by counsel for District is dispensed with pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.

ENTER: this 7th day of June, 1989.

/s/ Donald A. McGlothlin, Jr.
DONALD A. MCGLOTHLIN, JR.
Judge

Seen:

KARL K. KINDIG, ESQ.
CLINCHFIELD COAL COMPANY
P.O. Box 4000
Lebanon, Virginia 24266
PENN, STUART, ESKRIDGE & JONES
P.O. Box 2288
Abingdon, Virginia 24210

By /s/ Stephen M. Hodges
STEPHEN M. HODGES
Counsel for Clinchfield
Coal Company and Sea "B"
Mining Company

Seen and objected to except
as to disposition of fines:

UNITED MINE WORKERS OF AMERICA
INTERNATIONAL UNION
900 Fifteenth Street, N.W.
Washington, D.C. 20005

By /s/ William O. Shults
WILLIAM O. SHULTS
Counsel for International Union,
United Mine Workers of America,
and Marty Hudson

VIRGINIA:

In the Circuit Court for the County of Russell on
Thursday; the 18th day of May in the year of our Lord,
One thousand nine hundred eighty nine.

Present: The Honorable Donald A. McGlothlin, Jr., Judge

#12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

vs.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al*
Defendants

ORDER ADJUDICATING DEFENDANTS IN CONTEMPT

On May 16, 1989, this matter was heard upon the
Rules to Show Cause of April 28, 1989, (served on the
defendants International Union, United Mine Workers of
America, and District 28, United Mine Workers of Amer-
ica, on April 28, 1989), the Rules to Show Cause of
May 9, 1989 (served on said defendants on May 11,
1989 (served on said defendants on May 12, 1989).

Upon consideration of the evidence presented, and the
arguments of counsel, the Court finds that there have been
72 separate violations of the injunction and amended in-
junction previously entered in this matter, that these viola-
tions include 15 instances of violence attributable to said
defendants, 43 instances of exceeding picket numbers, 10
instances of blocking ingress and egress to plaintiffs' fa-
cilities, and 4 instances of reporting or technical type
violations of the amended injunction; and the Court fur-

ther finds that these violations involve 13 days of mass picketing and 12 days of blocking of plaintiffs' facilities.

Upon consideration of which, and for the reason stated in the Court's opinion from the bench following the trial which are incorporated hereby by reference, it is ADJUDGED, ORDERED and DECREED as follows:

(1) That Marty D. Hudson, who is coordinator of this strike for defendant International, is in contempt of the Court's injunctions and is fined \$1,000 for each he participated in violations of these injunctions, that is to say, the sum of \$13,000; however, \$12,000 of said amount is suspended on the condition that in the future he strictly comply with the terms of said injunctions and, within 10 days from entry of this decree, pay \$1,000 to the Clerk of this Court for the Commonwealth of Virginia;

(2) That Jackie Stump, who is President of defendant District 28, is in contempt of this Court's injunctions and is fined \$1,000 for each day he participated in violations of these injunctions that is to say, the sum of \$13,000; however, \$12,000 of said amount is suspended on the condition that in the future he strictly comply with the terms of said injunctions and, within 10 days from entry of this decree, pay \$1,000 to the Clerk of this Court for the Commonwealth of Virginia;

(3) That defendant, District 28, is in contempt of the Court's injunctions and is fined \$176,000 (of which \$26,000 is for nonviolent violations and \$150,000 for violent violations); however, \$150,000 of said amount is suspended on the condition that in the future it strictly comply with the terms of said injunctions, and, within 10 days from entry of this decree, pay \$26,000 to the Clerk of this Court for the Commonwealth of Virginia;

(4) That defendant International Union is in contempt of the Court's injunctions and is fined \$440,000 (of which \$65,000 is for nonviolent violations and \$375,000 is for violent violations); however, \$250,000 of

said amount is suspended on the condition that it strictly comply with the terms of said injunctions and, within 10 days from entry of this decree, pay \$190,000 to the Clerk of this Court for the Commonwealth of Virginia.

It is further ADJUDGED, ORDERED and DECREED, that in addition to any other sanctions the Court may impose, that the following minimum civil fines will be assessed against defendant International, District 28 and its members:

(1) \$100,000 for each instance of any future violent violation of the Court's injunctions;

(2) \$20,000 per day for each instance of any future nonviolent violation of the Court's injunctions, such as exceeding picket numbers, blocking entrances or exits, exceeding space or location limitations, or having roving pickets;

(3) \$5,000 for each day of any other violation of the Court's injunctions.

It is further ADJUDGED, ORDERED and DECREED that defendants, at their expense, shall immediately cause a copy of this order and the amended injunction of April 21, 1989, to be served on every member of District 28.

Counsel for defendants have either endorsed this decree or had due notice of its presentation for entry.

ENTER this the 18th day of May, 1989.

/s/ Donald A. McGlothlin, Jr.
DONALD A. MCGLOTHLIN, JR.
Judge

Seen:

/s/ Stephen M. Hodges
Counsel for Plaintiff

Seen and Objected to:

/s/ William O. Shults
Counsel for Defendant
International Union

/s/ James J. Vergara Jr.
Counsel for defendant
District 28

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

In Chancery

CLICHFIELD COAL COMPANY, *et al*,
Plaintiffs,

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al*,
Defendants.

AMENDED INJUNCTION

This day came the plaintiffs by counsel upon their motion to amend the temporary injunction entered by the Court on April 13, 1989. The Court finds that verbal notice of the hearing was given to International and District 28 on the morning of April 20, 1989. The Court has been contacted by counsel for both, and has been advised that because of conflicting demands, counsel will not be present. However, the Court finds that the situation now prevailing in connection with the strike does not justify a delay in the hearing.

Upon the evidence presented, the Court finds as follows:

1. Notwithstanding the injunction entered by the Court on April 13, 1989, serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction have continued throughout many areas of Clinchfield's operating system in Dickenson and Russell Counties, Virginia.

2. The acts described above are being committed by members of International and District 28 and the locals

in question, or those acting for them, and are an outgrowth of the strike now in progress.

3. The acts described will continue if not enjoined.

4. The strike was called by International and is being conducted and organized by International and District 28.

5. The harm done to the defendants by the entry of the injunctive relief hereby granted is light compared to the harm which will be suffered by the plaintiffs if such relief should be denied.

6. The plaintiffs have no adequate remedy at law.

Wherefore, it is adjudged, ordered and decreed that International and District 28 and Local Unions 1426 and 7170, and their officers, agents, servants, employees and members be and are hereby restrained and enjoined from committing or attempting to commit any of the following acts:

1. Placing or permitting its members to congregate at entrances or exits to any of plaintiffs' offices, mine sites, plant sites or other facilities or using mirrors, lights or other devices in such manner as to obstruct the vision of operators of vehicles entering or exiting, of the roadway for oncoming traffic.

2. Causing or permitting their members to throw or cause to be thrown rocks or any other object or missile at persons employed by plaintiffs or plaintiffs' contractors or at vehicles owned or operated by plaintiffs or by others performing work or services for plaintiffs at any location in the Commonwealth of Virginia.

3. Placing any objects which by their design might puncture or cause damage to vehicle tires upon any surface which might be used by the vehicles of plaintiffs, their employees or others performing work or services for plaintiffs in the Commonwealth of Virginia.

4. Threatening to physically harm any of plaintiffs' employees or others performing work or services for plaintiffs or their families or their property.

5. Purposely following or trailing the plaintiffs' employees, contractors, or the family members of either in vehicles or on foot, in such a manner as would reasonably be expected to frighten them.

6. Causing or permitting any person to interfere or attempt to interfere with plaintiffs' employees or others performing work or services for plaintiffs in the performance of their duties for plaintiffs, by the use of insulting or threatening language directed toward such persons to induce or attempt to induce them to quit employment or refrain from seeking employment.

7. Placing or permitting pickets, observers or associates of pickets more than the number of persons indicated at the designated locations shown on Exhibit A.

8. Placing or permitting the pickets, observers or associates of pickets at such designated locations so that the extremities of the picket line at each such designated location exceed a distance of 200 feet.

9. Having or permitting any picket site along any public or private road over which plaintiffs or their contractors haul coal more than 500 feet from the main entrance to any company facility designated on Exhibit A or any other company facility.

10. Having or permitting any roving or moving pickets.

It is further adjudged, ordered and decreed that the International, District 28 and the said local unions and their respective officers, agents, servants, employees and members shall:

11. Place a designated supervisor or captain (who shall count as one of the pickets or observers) at each

picket site designated by this decree to be present at said picket site at all times during picketing and to supervise the activities of the pickets, observers or associates of pickets, and to require obedience to this decree. The designated supervisor or captain shall be an officer, agent or specially designated member of the International, District 28 or a local union within District 28.

12. Keep and make available to the Court, police officers and plaintiffs the names of the designated supervisors or captains at each site upon request.

13. Report to the Court in writing the date and nature of all violations of this injunction and the names of all persons who participate in such violations.

14. Use all lawful means reasonably available to them to insure compliance with the provisions of this injunction and specifically use their best efforts to communicate the terms of this injunction to all persons known to them to be likely to be present at or participate in any picketing or other action in connection with the present strike.

The bond heretofore given by plaintiffs will continue in full force and effect as to the injunction as amended. The injunction will remain in effect until 11:59 p.m., October 12, 1989.

Requested:

PENN, STUART, ESKRIDGE & JONES
P.O. Box 2288
Abingdon, VA 24210

By /s/ Stephen M. Hodges
STEPHEN M. HODGES
Counsel for Defendants

ENTER, this 21st day of April, 1989 at 11:30 a.m.

/s/ Donald A. McGlothlin, Jr.
Judge

EXHIBIT A

Clinchfield Coal Company Facilities

	<u>No. Persons Allowed</u>
1. Headquarters	15
2. Moss No. 3	10
3. Central Shop	4
4. Laurel Mountain	6
5. Yowling Branch	4
6. Lambert Fork	10
7. Dante Office	10
8. Old Smith Gap	10
9. Banner Dock	4
10. McClure Mine	10
11. McClure Preparation Plant	10
12. Maple House	6
13. Open Fork No. 2	4
14. Kilgore Creek	4
15. Triple C	6
16. Splashdam Portal	10
17. Splashdam Loadout	10

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

 In Chancery

 CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

vs.

 INTERNATIONAL UNION, UNITED MINE WORKERS OF
 AMERICA, *et al.*,
Defendants.

INJUNCTION

On April 12, 1989, this cause came on to be heard before the Court on the plaintiffs' verified bill of complaint, seeking a temporary injunction. International Union, United Mine Workers of America ("International") and District 28, United Mine Workers of America ("District 28") appeared specially by their respective counsel, no other defendant appeared. The parties presented evidence, legal authorities and argued their respective positions.

Based upon the verified complaint, the evidence, arguments and authorities presented, the Court finds that certain of the acts complained of in the bill of complaint constitute a violation of Section 40.1-53 and Section 40.1-66 of the Code of Virginia, and of the rights of the plaintiff, Clinchfield Coal Company ("the Company"); that such acts are likely to continue; that the Company will suffer irreparable injury because of such acts if not enjoined; that the Company has no adequate remedy at law for such immediate and irreparable injury and loss, that no harm to the defendants will result from

the entry of a temporary injunction, and that the Court is otherwise satisfied of the plaintiffs' equity.

Now, therefore, for the reasons stated, it is ADJUDGED, ORDERED and DECREED that International and District 28, Local Union #7170 U.M.W.A., and Local Union #1426 U.M.W.A., and their officers agents, servants, employees and members be and hereby are restrained and enjoined from committing or attempting to commit any of the following acts:

1. Placing or permitting its members to congregate at entrances or exits to plaintiffs' Lambert Fork #2 Mine site in such a manner as to obstruct the vision of operators of vehicles, entering or exiting, of the roadway for oncoming traffic.

2. Causing or permitting their members to throw or cause to be thrown rocks or any other object or missile at persons employed by plaintiffs or plaintiffs' contractors or at vehicles owned or operated by plaintiffs or by others performing work or services for plaintiffs at Lambert Fork #2 Mine and between Lambert Fork #2 Mine and Moss 3 Preparation Plant or any other of plaintiffs' properties.

3. Placing any objects which by their design might puncture or cause damage to vehicle tires upon any surface which might be used by the vehicles of plaintiffs, their employees or others performing work or services for plaintiffs.

4. Threatening to physically harm any of plaintiffs' employees, or others performing work or services for plaintiffs, or their families or their property.

5. Placing or permitting more than 10 persons as pickets, observers or associates of pickets at or near plaintiffs' Splashdam Mine complex on Greenbriar Creek, and/or placing or permitting more than 10 persons as pickets, observers or associates of pickets at or near the

Lambert Fork #2 Mine including the route taken by vehicles hauling coal from Lambert Fork #2 Mine to plaintiffs' Moss 3 Preparation Plant, and further from placing or permitting such pickets, observers and associates to be located on the traveled portion of any public or private right-of-way used by those entering or exiting Lambert Fork #2 Mine or hauling coal therefrom.

6. Causing or permitting their members to interfere or attempt to interfere with plaintiffs' employees or others performing work or services for plaintiffs in the performance of their duties for plaintiffs by the use of insulting or threatening language directed toward such persons to induce or attempt to induce them to quit employment or refrain from seeking employment.

It is further ADJUDGED, ORDERED and DECREED that International and District 28 and Local Unions #1426 and 7170, UMWA, and their officers, agents, servants, employees and members, shall use all lawful means reasonably available to them to insure compliance with the provisions of this injunction and specifically shall use their best efforts to communicate the terms of this injunction to all persons known to them to be likely to be present at or participate in any picketing or other acts done in connection with the present strike.

All temporary relief requested by the bill of complaint not herein expressly granted is denied.

Pursuant to the provisions of Section 8.01-624 of the Code of Virginia, this temporary injunction shall be effective immediately upon the giving of bond as described herein below and shall expire at 11:59 p.m. on October 12, 1989, unless sooner vacated.

Pursuant to the provisions of Section 8.01-631 of the Code of Virginia, this injunction shall not take effect until bond be given conditioned to pay all costs as may

be awarded against the plaintiffs and all such damage as may be incurred in case the injunction shall be dissolved, which bond shall be in the penalty and amount of \$25,000.00. The Court approves a bond in such penalty with Clinchfield Coal Company as principal and United States Fidelity and Guaranty Company as surety.

ENTER this 13th day of April, 1989, at 4:35 p.m.

/s/ Donald A. McGlothlin, Jr.
DONALD A. MCGLOTHLIN, JR.
Judge

Seen and objected to to the extent relief requested denied:

PENN, STUART, ESKRIDGE & JONES

By /s/ Stephen M. Hodges

Seen and objected to to the extent relief requested denied:

/s/ William O. Shults
Counsel for International Union, U.M.W.A.

Counsel for District 28, U.M.W.A.

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of January, 1993.

Record No. 920299
Court of Appeals Nos. 1953-89-3 and
1508-90-3 through 1513-90-3

INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA, *et al.*,
Appellants.
against

CLINCHFIELD COAL COMPANY, *et al.*,
Appellees.

Record No. 910634
Court of Appeals Nos. 0790-89-3, 0904-89-3,
1287-89-3, 1333-89-3, 1629-89-3 and 1743-89-3

JOHN L. BAGWELL, Special Commissioner,
Appellant,
against

INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA, *et al.*,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of The International Union, United Mine Workers of America and another

123a

to set aside the judgments rendered herein on the 6th day of November, 1992 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

/s/ [Illegible]
Clerk

CITED PROVISIONS OF THE CONSTITUTION
OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

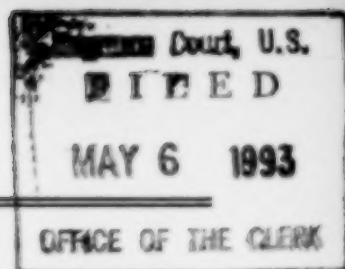
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3
No. 92-1625



In The
Supreme Court of the United States
October Term, 1992

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA and UNITED MINE WORKERS OF
AMERICA, DISTRICT 28,

Petitioners,

v.

JOHN L. BAGWELL, SPECIAL COMMISSIONER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM B. POFF
CLINTON S. MORSE
FRANK K. FRIEDMAN
WOODS, ROGERS & HAZLEGROVE
Dominion Tower, Suite 1400
10 South Jefferson Street
Post Office Box 14125
Roanoke, Virginia 24038-4125
(703) 983-7600

Counsel for Respondent
John L. Bagwell,
Special Commissioner

QUESTIONS PRESENTED

1. Whether fines assessed in accordance with a prospective fine schedule, designed to coerce a recalcitrant party from continuing to violate an injunction that both prohibits unlawful conduct and requires certain affirmative conduct, are "civil" in nature where the recalcitrant party has the power to avoid the specified fines by complying with the court's orders?
2. Whether the Virginia Supreme Court was correct in holding that it is a matter of state, not federal, law whether the subsequent settlement of underlying civil litigation necessarily moots coercive, civil sanctions imposed during the litigation?
3. Whether contempt fines assessed in accordance with a prospective fine schedule imposing a specific amount for each *future* violation of an injunction contravene either the Due Process Clause of the Fourteenth Amendment or the Excessive Fines Clause of the Eighth Amendment, where the contemnor can avoid additional fines at any time merely by complying with the court's lawful injunction?

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STATEMENT OF THE CASE

This case concerns the efforts of a trial court to coerce, through the imposition of a prospective schedule of contempt fines, union officials to cease and desist acts of violence, intimidation and damage and to take affirmative actions to prevent union members and sympathizers from engaging in such acts. The Union steadfastly ignored the court's attempt to stop the reign of terror and violence, accumulating in the process an expensive total of civil contempt fines.

1. The strike that gave rise to this action was called on April 5, 1989, by the President of petitioner United Mine Workers of America ("UMW" or the "Union") against two coal companies in southwestern Virginia. When the companies tried to maintain operations, the UMW announced that it would engage in "a new level of creative militancy" against the companies. The Bureau of National Affairs, Inc. "Daily Labor Report" No. 153, p. A-11 (1990). The UMW later said that the strike was against the entire state of Virginia.¹

2. On April 12, 1989, the coal companies filed a verified bill of complaint seeking to enjoin the Union from engaging in certain unlawful activities. On April 13, 1989, after an evidentiary hearing, the trial court enjoined the Union from engaging in certain violent, intimidating, and damaging acts. (App. 118a-121a). On April 21, 1989, the trial court amended and strengthened its injunction, finding that, notwithstanding the initial injunction, "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction have continued. . . ." (App. 113a-116a).

The injunction not only *prohibited* the Union from engaging in certain actions, it also *required* that Union

¹ *Clark v. International Union, UMWA*, 752 F. Supp. 1291, 1294 n.4 (W.D. Va. 1990).

officials take certain *affirmative* steps to stop acts of violence and intimidation by Union members and sympathizers. For example, the injunctive orders issued by the trial court affirmatively directed the Union to place a designated supervisor or captain at each picket site to enforce the injunction; to make available the names of strike supervisors to law enforcement officials; to report to the court in writing all violations of the injunction; and to use all lawful means reasonably available to ensure compliance with the injunction. (App. 115a-116a, 120a).²

3. Despite these measures, wholesale violations of the court's injunction continued. The trial court ordered the Union to show cause why it should not be held in contempt. After the first contempt hearing, the trial court found 72 separate violations of its injunction. (App. 109a). The trial court imposed \$642,000 in fines, \$424,000 of which were suspended. (App. 4a n.2; Bagw. App. 55-57). Subsequently, the trial court vacated *all* of these initial fines on the ground they were punitive, and hence "criminal in nature," because the Union was not given the opportunity to avoid them once they were specified. (App. 4a n.2).

After the first contempt hearing, the trial court also established a prospective fine schedule designed to coerce the Union to refrain from committing future violations of the injunction. The schedule provided for fines of \$100,000 for each violent violation and \$20,000 for each nonviolent violation. (App. 111a). When it established the prospective fine schedule, the trial court made clear that

² References to the Appendix filed in this Court will be made as "App. ____." In the Virginia Supreme Court, the cases were appealed by two separate record numbers and consisted of three separate appendices. References to the record in the appeal initiated by Bagwell will be by "Bagw. App. ____." References to the record in the appeal initiated by the UMW will be by "UMW App. ____." References to documents in the Virginia Court of Appeals' Record certified to the Virginia Supreme Court will be "C.A. App. ____."

it was attempting to coerce the Union into complying with its orders, and that the Union could avoid paying any fines merely by complying with the court's injunction:

[T]he union and its members are responsible for how much money . . . is going to be paid, not this Court, not the company, not anyone else. If you go out and violate the law, you are taking that action of your own free will and . . . you will pay the consequences, because it is your act.

. . .

I firmly believe that the fate of the union with regard to these violations is in the hands of those members and leadership that we have seen here in court today. . . . I sincerely hope that you will be able to conduct yourself in a law abiding manner. . . .

(Bagw. App. 575, 579).

4. Notwithstanding the prospective fine schedule, the Union continued to violate the injunction. "As time passed, the violations increased in frequency and became more violent." *Bagwell v. International Union, UMW*, 224 Va. 463, 476, 423 S.E.2d 349, 357 (1992) (App. 14a). (See also UMW App. 544-45, 548-49, 581-82, 598-600, Bagw. App. 1487-92, 1604-07, 1674.) The trial court found on the record that the strike was "characterized by violence and terrorism." (Bagw. App. 3191).

For example, the record in this case demonstrates that Union members frequently engaged in rock throwing. (UMW App. 491-94, 518-19, 568-69). Union members also placed "jackrocks" (iron spikes in the shape of a star used to puncture tires) on area roads. (UMW App. 493-96, 509, 540-41, 567, 570, 576-78). Indeed, so bad were the jackrock attacks that the state police had to use a "magnet truck" daily to clear the roads of jackrocks, nails and other tire-puncturing devices. (Bagw. App. 328). Jackrocks were also placed near the homes of company employees where their children could step on them.

(Bagw. App. 1607). Strikers doused the face of a company guard with acid. (UMW App. 581-82). Women whose husbands worked for the coal companies were threatened and attacked by strikers. (Bagw. App. 1492, 1487-91, 1604-07, 2710-12). Workers were pulled off the road, threatened, and in some instances beaten, by strikers. (UMW App. 544-45, 548-49, 610-21). There was repeated gunfire. (UMW App. 490, 520, 590, 591-92, 607). And smashed windshields and flattened tires became a way of life for area residents. (Bagw. App. 436-38, 1146-47, 1173-74, 1535, 1538-40).

5. In trying to stop this reign of terror, the trial court was forced to issue no fewer than *eight* separate contempt orders against the Union. (See, e.g., App. 55a). Prior to the entry of each contempt order, the Union was served with a show cause order outlining specifically the alleged contumacious conduct. (See, e.g., UMW App. 26-42, 66-73, 86-92). Discovery was utilized. Lengthy hearings were held with respect to each contempt order. The Union was represented by counsel, and the court required that violations be proved by a strict standard. (UMW App. 267; Bagw. App. 1943, 1947, 2914-16, 3188, 4172). The Union presented evidence and cross-examined opposing witnesses. The court heard myriad witnesses, reviewed hundreds of exhibits, and considered oral argument. The record of the proceedings is literally thousands of pages.

6. Throughout the eight contempt proceedings, the court imposed two types of fines. Civil compensatory fines were assessed, payable to the coal companies, based on the harm caused to them. Those fines are not at issue here. The court also assessed coercive fines in accordance with the prospective fine schedule.

The court repeatedly stated that the purpose of the prospective fine schedule was to coerce the Union into complying with the court's orders. For example, after the second contempt hearing, the trial court stated:

I don't know how much money these defendants are willing to pay before they will obey

the law. I hope [the fine schedule] will deter any future violations.

(Bagw. App. 886). Over and over again, in the course of the eight contempt hearings, the trial judge made clear that the purpose of the fines assessed under the prospective fine schedule was to compel compliance, and that the Union could avoid the prospective fines by complying with the injunction:

The Court is convinced, as [it has] stated numerous times, that this is a civil contempt proceeding. The only way that any fines or any penalties can be assessed is for the defendants to fail to comply with the Court's injunctive orders and the laws of the Commonwealth of Virginia as [they] are stated or . . . outlined in the order. This is not punitive. It is compulsory. It is designed to compel compliance and therefore it is not criminal in nature but civil.

(UMW App. 222).

7. But the Union would not comply, and the fines accumulated under the prospective fine schedule. All together, over the course of seven additional contempt hearings following the establishment of the fine schedule, the trial court found hundreds of violations of the injunction, most of them *violent*. In total, the Union accumulated over \$64 million in fines.

8. After months of violence and terror, the Union and the coal companies ultimately settled their labor dispute and the strike ended. As part of the settlement of the labor dispute, the parties moved the trial court to vacate all fines. (UMW App. 163-66). After considering the matter, the trial court agreed to vacate approximately \$12 million in compensatory civil fines (see Bagw. App. 2152, 3566, 4270, 4274) that were payable to the companies for damage and harm caused by violations of the injunction. (App. 43a).

The trial court refused to vacate, however, the remaining \$52 million in coercive civil fines that had been assessed in accordance with the fine schedule and that

were payable to the Commonwealth of Virginia and the two affected counties. In refusing to vacate these fines, the trial judge emphasized yet again that the purpose of these prospective fines had been to try to compel compliance with the court's orders:

The Court early on announced its purpose in imposing prospective civil fines the payment of which would only be required if it were shown the defendants disobeyed the Court's orders. That purpose was to compel compliance with the Court's orders which were entered to protect the rights of the plaintiffs and the public. The fines were conditional and it was within the defendants' sole power to avoid payment of the fines.

(App. 40a-41a).

The trial court appointed Special Commissioner John Bagwell to collect the outstanding fines. (App. 51a-52a).

9. The Union appealed the trial court's contempt orders and fines to the Virginia Court of Appeals. The Union argued that the remaining fines were "criminal," not civil, and therefore were imposed without the full-blown constitutional protections attending criminal proceedings. The Union also argued that the settlement of the underlying labor dispute and litigation rendered the fines moot.

The Court of Appeals treated the fines imposed in accordance with the prospective fine schedule as "civil" and found that "the [trial] court imposed the fines in question to coerce compliance with its orders . . ." The Court, therefore "conclude[d] that these fines were coercive civil fines . . ." *International Union, UMW v. Clinchfield Coal Co.*, 12 Va. App. 123, 129, 402 S.E.2d 899, 903 (1991) (App. 31a-32a). The Court of Appeals also found that the extent of the Union violence, lawlessness and misconduct "reasonably required" fines of "considerable magnitude." *Id.*

On the question of mootness, the Court of Appeals found to be "eloquent" the decision in *Clark v. International Union, UMW*, 752 F. Supp. 1291 (W.D.Va. 1990),

arising out of the same labor dispute as this case, holding that, as a matter of federal law, the settlement of the underlying litigation does not necessarily moot civil contempt fines imposed in a completed proceeding prior to settlement. 12 Va. App. at 131, 402 S.E.2d at 904 (App. 34a). However, the Virginia Court of Appeals concluded that the question of whether the subsequent settlement mooted the contempt fines was a matter of state law, and that binding state precedent required it to hold that the settlement of the underlying litigation mooted the coercive civil contempt fines. 12 Va. App. at 132, 402 S.E.2d at 904 (App. 34a).

10. The Virginia Supreme Court reversed. Applying this Court's precedents in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), *United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Hicks v. Feiock*, 485 U.S. 624 (1988), the Virginia Supreme Court concluded that the fines imposed in accordance with the prospective fine schedule were "civil," not criminal. In support of that conclusion, the Virginia Supreme Court found that the trial court's clear, express, and often-repeated purpose in establishing the fine schedule and imposing the fines was to "coerce the Union into compliance with the court's injunction." 244 Va. at 476-77, 423 S.E.2d at 357 (App. 14a-15a). The court also found that the Union "controlled its own fate," and under the fine schedule had the power to avoid the specified fines merely by ceasing to violate the trial court's injunction. *Id.*

The Virginia Supreme Court rejected the Union's argument that the fines were criminal merely because they were imposed for violation of an injunction that prohibited the doing of an act, rather than for violation of an injunction that affirmatively required the performance of an act. In rejecting this argument the Court found that the coercive nature of the fines imposed in this case and the Union's ability to avoid the prospective fines by complying with the court's orders – hallmarks of "civil" fines – did not in any way depend on the prohibitory or mandatory nature of the underlying injunction.

The Virginia Supreme Court also rejected the Union's argument that the settlement of the underlying labor dispute and litigation *required* the trial court to vacate *all* of the civil fines imposed against the Union. The Virginia Supreme Court "agree[d] with the Court of Appeals that 'whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law,'" and held *as a matter of state law* that the fines in question were not moot. 244 Va. at 478, 423 S.E.2d at 358 (App. 16a) (emphasis added).

The Court also found, in light of the financial strength of the UMW, the gravity of the harm caused by the UMW's wrongdoing, and the UMW's scorn for the rule of law, that the civil coercive fines were not excessive and did not constitute an abuse of discretion. 244 Va. at 479-80, 423 S.E.2d at 359 (App. 18a-19a).

REASONS FOR DENYING THE WRIT

None of the questions presented by the petition for certiorari in this case warrant review by this Court:

1. The primary question presented by the petition – pertaining to the distinction between civil and criminal contempt – involves nothing more than a routine application of well-settled law – *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), *United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Hicks v. Feiock*, 485 U.S. 624 (1988) – to the facts of this case.

a. "The demarcation between civil and criminal contempt is well-established" and not in need of clarification. *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). This Court has held that the difference between civil and criminal contempt depends "not [on] the fact of punishment but rather [the] *character and purpose*" of the sanction imposed. *Gompers*, 221 U.S. at 441 (emphasis added). With respect to purpose, a civil contempt sanction is *coercive* in nature. As this Court held in *United Mine Workers*, 330 U.S. at 303-04, a civil contempt

is designed to compel a recalcitrant party to obey the court's orders. In contrast, a criminal contempt sanction is imposed primarily to *punish* the contemnor for disobeying the court. *Id.* at 302-03. With respect to the character of the penalty imposed, criminal contempt imposes a "determinate and unconditional" penalty, whereas a civil coercive contempt sanction is "conditional," in that it gives the contemnor the chance to avoid the penalty by complying with the court's orders. *Hicks*, 485 U.S. at 632-33. *See pp. 12-13, infra.*

b. In a unanimous opinion, the Virginia Supreme Court applied these well-settled principles with care in this case. After reviewing the voluminous record, including the eight separate contempt hearings, the Virginia Supreme Court concluded that the fines imposed after the *first* contempt hearing were properly vacated because they were "determinate and unconditional," and hence they had been improperly imposed without the constitutional safeguards that must accompany criminal contempt. As to the subsequent fines remaining on appeal, however, the Virginia Supreme Court held that they were civil in nature because (i) they were imposed for the express purpose of trying to force the Union to comply with the court's orders, and (ii) their character was "conditional" inasmuch as they were imposed only after the Union violated the prospective schedule of fines set up by the court to deter additional violations. 244 Va. at 475-76, 423 S.E.2d at 356-57 (App. 12a-15a). Contrary to petitioners' protestations, the Virginia Supreme Court's decision on this issue is entirely consistent with *Gompers* and *Hicks*.

c. Moreover, petitioners concede that the decision below is consistent with the decisions of other lower courts. It appears that every court to consider the issue has held that fines imposed as a result a party's violation of a prospective fine schedule are civil within the meaning of *Gompers* and *Hicks* if they are imposed to coerce the party to comply with the court's earlier orders. Because there is no conflict on this issue, which is the only issue

genuinely presented by *this* case, certiorari should be denied. See pp. 16-18, *infra*.

d. Petitioners attempt to recharacterize *Gompers* and *Hicks* as setting forth a rigid rule that a contempt sanction is criminal if it was imposed for violation of an order that *prohibited* the contemnor from acting in a certain way, as opposed to an order that required the contemnor to do an *affirmative act*. This attempt is totally unavailing. See pp. 18-20, *infra*.

First, petitioners are wrong that *Gompers* and *Hicks* established a mechanical test based on whether the underlying injunction was "mandatory" or "prohibitory." On the contrary, in both cases, this Court recognized that there is no rigid formula for distinguishing between civil and criminal contempt.

Second, petitioners do not cite a single case from any jurisdiction holding that *Gompers* or *Hicks* makes the so-called "mandatory/prohibitory" distinction the *sine qua non* of the difference between civil and criminal contempt. The lack of any split of authority militates strongly against granting certiorari on this question. See pp. 20-21, *infra*.

Third, this Court has itself approved the use of civil coercive sanctions in cases where the contemnor failed to comply with a "prohibitory" order. See p. 22, *infra*.

Fourth, the effect of petitioners' proposed recharacterization of *Gompers* and *Hicks* would be radical and absurd. In petitioners' new world, the mechanism of a prospective fine schedule would be unworkable because it could be applied only through the lengthy and cumbersome criminal process that would occur solely *after* the wrongdoing. Petitioners' rigid rule would also lead to absurd results, since petitioners' mandatory/prohibitory distinction would logically apply as well to *administratively* or *legislatively-imposed* fines. Thus, in one fell swoop, petitioners' new rule would call into question the constitutionality of a host of statutory procedures for imposition of administratively or legislatively-imposed

civil fines based on "prohibitory" laws. See pp. 22-23, *infra*.

Fifth, even if there were merit to petitioners' bright-line rule, this case does not cleanly present the issue. The trial court's orders were partly prohibitory and partly mandatory within the sense used by petitioners. Thus, this case does not properly present even the issue that petitioners attempt to inject into it. See pp. 23-24, *infra*.

2. The second question presented – whether the settlement of the underlying labor dispute renders moot the civil contempt fines imposed by the trial court payable to the Commonwealth of Virginia and two counties – does not raise any substantial federal question. The effect of a settlement on outstanding civil contempt fines is a matter of state law with which the federal courts should not interfere. But even if it were a federal question, the decision of the Virginia Supreme Court on this issue accords with analogous federal cases. See pp. 25-27, *infra*.

3. The final reason posited by the UMW for granting its writ is that civil coercive fines are somehow analogous to punitive damages in tort law or civil forfeitures under 21 U.S.C. § 881. Recent cases concerning allegedly excessive punitive awards in tort trials involving minor compensatory damages, and large forfeitures based on offenses involving relatively small amounts of drugs, are readily distinguishable from the fines at issue here. In this case, the UMW faced prospective coercive fine schedules which clearly indicated in advance the fines that would be assessed. There was no surprise. There is, therefore, no reason to hold this petition pending disposition of either *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, cert. granted, 61 L.W. 3400 (Nov. 30, 1992) or *Austin v. United States*, No. 91-6073, cert. granted, 61 L.W. 3496 (Jan. 15, 1993).

Moreover, here the UMW fails to present any meaningful argument that the fines imposed were excessive or disproportionate in light of the relevant factors to be considered in fixing coercive fines. *United Mine Workers*,

330 U.S. at 304. After treating the court's authority as a joke, and the violation of court orders as a badge of honor, the UMW now seeks to avoid the clear consequences of its contumacious conduct by wrapping itself in the same "law" which it so thoroughly reviled below. The trial court did not abuse its discretion in assessing these prospective, coercive fines. The fact that the fines reached high amounts is indicative only of: (a) the unprecedented level of scorn with which the UMW treated court orders and (b) the wealth of the contemptuous party.

In addition: (1) though the Virginia Supreme Court expressly held that the amounts of the fines in this case were "not . . . excessive as a matter of law," it did not specifically address whether the Excessive Fines Clause of the Eighth Amendment applies either to the States generally or to court-imposed civil contempt fines in particular; and (2) the Virginia Supreme Court's conclusion that the fines are not "excessive as a matter of law" is consistent with the broad proportionality principles previously announced by this Court. Therefore, no further review of the excessiveness issue is warranted.

I. THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT IS "WELL SETTLED," THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH ANY DECISION OF AN INFERIOR FEDERAL COURT OR A STATE COURT OF LAST RESORT.

A. The Distinction Between Civil Contempt and Criminal Contempt is Well Settled.

"The demarcation between civil and criminal contempt is well-established." *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). In *Gompers*, this Court held that the difference between civil and criminal contempt lies "not [in] the fact of punishment, but rather [in the] character and purpose" of the contempt sanction.

221 U.S. at 441. The Court explained that a contempt sanction is generally considered civil where its purpose is either to remedy harm caused to the other party by the contempt, or to coerce the recalcitrant party to obey the Court's orders. *Id.* at 442. See also *United Mine Workers*, 330 U.S. at 303-04. By contrast, the purpose of criminal contempt is more exclusively "punitive," 221 U.S. at 441, and is generally divorced from any "coercive or remedial" goal. *Id.* at 442.

More recently, in *Hicks v. Feiock*, 485 U.S. 624 (1988), this Court elucidated the general principles of *Gompers*. In *Hicks*, the Court explained that where the contempt penalty imposed is "determinate and unconditional," its purpose is "solely and exclusively punitive in character," and hence generally criminal in nature. *Id.* at 632-33. On the other hand, where the contempt penalty is "conditional," in the sense that the contemnor "has it in his power to avoid any penalty," and thus "carr[ies] the keys of [its] prison in [its] own pockets," the purpose of the contempt is more coercive, and hence civil, in nature. *Id.* at 633 (citations omitted). See also *Penfield Co. v. SEC*, 330 U.S. 585 (1947); *Shillitani v. United States*, 384 U.S. 364 (1966).

Although "it may not always be easy to classify a particular [sanction] as belonging to either" the civil or criminal category, *Gompers*, 221 U.S. at 441, these "principles have been settled at least in their broad outlines for many decades." *Hicks*, 485 U.S. at 631; see also *Terry*, 886 F.2d at 1350.

Moreover, "[w]hen a State's [contempt] proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority 'in a nonpunitive, noncriminal manner.'" *Hicks*, 485 U.S. at 631 (citation omitted). "[O]ne who challenges the State's classification of the relief imposed as 'civil' or 'criminal' [must] show 'the clearest proof' that it is not correct as a matter of federal law." *Id.* (emphasis added).

B. The Decision Below Correctly Applies the Principles Set Forth in *Gompers* and *Hicks*.

The decision below correctly sets forth the governing law of *Gompers*, *United Mine Workers*, and *Hicks*:

Contempts are classified as either "criminal" or "civil," although each "may partake of the characteristics of the other." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). "It is not the fact of punishment but rather its character and purpose, that often serve to distinguish between the two classes of cases." *Id.* The punishment, whether fine or imprisonment, is deemed to be criminal if it is determinate and unconditional, and such penalties "may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632-33 (1988). The punishment is deemed to be civil if it is conditional and a defendant can avoid such a penalty by compliance with a court's order. *Id.* at 633. Civil contempt sanctions are either compensatory or coercive. Compensatory, civil contempt sanctions compensate a plaintiff for losses sustained because a defendant disobeyed a court's order. Coercive, civil contempt sanctions are imposed to compel a recalcitrant defendant to comply with a court's order. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *Gompers*, 221 U.S. at 448; *United States v. Darwin Const. Co., Inc.*, 873 F.2d 750, 753-54 (4th Cir. 1989).

244 Va. at 475, 423 S.E.2d at 356 (App. 12a-13a).

After faithfully setting forth these well-settled principles, the Virginia Supreme Court then applied them with great care. First, the Court noted that the fines imposed by the trial court after the first contempt hearing were properly vacated because they were, under the principles set forth above, *criminal* in nature. These fines were imposed based on the Union's numerous injunction violations *before* the trial court set a prospective schedule of

fines for future violations. Because the Union had no real opportunity to avoid these fines once they were announced, the Virginia Supreme Court explained that they were "determinate and unconditional" and thus fell on the criminal side of the *Gompers-Hicks* line.

The remainder of the fines at issue on appeal were of an entirely different sort – those assessed for violation of the prospective fine schedule established by the trial court after the first contempt hearing. With respect to these fines, after reviewing the voluminous record, the Virginia Supreme Court made two important findings: First, the trial judge had expressly and clearly stated that he was "establish[ing] a prospective fine schedule in an effort to coerce the Union into complying with the court's injunction." 244 Va. at 476, 423 S.E.2d at 357 (App. 13a). Second, the Court found, as the trial court had repeatedly stated on the record, that the prospective fine schedule gave the Union "the power to avoid imposition of [the] fines" merely by complying with the Court's outstanding orders. *Id.* (App. 14a). Based on these determinations, the Virginia Supreme Court concluded that these fines were conditional within the meaning of *Gompers* and *Hicks* and hence civil, not criminal, in nature.

This is a faithful, correct application of *Gompers* and *Hicks*. Petitioners' view that the fines imposed under the fine schedule were punitive, and hence criminal, reflects the mistaken assumption that the mere fact that the fines imposed by the prospective schedule ultimately became due transformed a prospective, coercive remedy into an exclusively punitive criminal penalty. But that view has been roundly rejected by the lower federal courts. For example, in *Hoffman v. Beer Drivers & Salesmen's Union Local No. 888*, 536 F.2d 1268, 1273 (9th Cir. 1976), the court held that the mere fact that a conditional contempt fine ultimately becomes due does not make it punitive (and hence criminal):

[I]nvariably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. The

due date occurs because the actor has failed to use the key to the jail which the court provided. . . . The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

See also *N.L.R.B. v. Blevins Popcorn Co.*, 659 F.2d 1173, 1185 & n.74 (D.C. Cir. 1981); *Brotherhood of Locomotive Firemen and Engineers v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570 (D.C. Cir.) cert. denied 387 U.S. 570 (1967).

In short, the Virginia Supreme Court's application of *Gompers* and *Hicks* to the specific facts of this case – where the trial court imposed a prospective fine schedule in order to coerce the Union into complying with the court's injunctions – is nothing more than a routine application of the well-settled principles established by those cases. And surely, petitioners cannot possibly establish by "the clearest proof," as *Hicks* requires, 485 U.S. at 631, that the Virginia Supreme Court's classification of the fines as coercive and conditional is incorrect as a matter of federal law.³ Thus, there is no reason for further review of this case.

C. The Decision Below Accords With the Unanimous View of Other Courts that Fines Imposed Under a Prospective Fine Schedule Intended to Coerce a Party to Comply with Outstanding Court Orders are Civil in Nature.

As petitioners effectively concede, the Virginia Supreme Court's holding is in accord with the

³ It is wrong and unfair to describe the Virginia Supreme Court's decision, as petitioners have, as "singular in its disdain for *Gompers* and *Hicks* as constitutional precedents of binding force." Pet. at 7.

overwhelming majority of courts that have considered whether coercive fines imposed under a prospective fine schedule are civil under the reasoning of *Gompers* and *Hicks*.

For example, in a line of cases involving the efforts of "Operation Rescue" to block access to abortion clinics, three different United States Courts of Appeal have recently held that fines assessed according to a prospective schedule intended to coerce a party from continuing to take action prohibited by an injunction are "civil" within the meaning of *Gompers* and *Hicks*. That is so, these courts have rightly concluded, because such fines are "entirely conditional and coercive," and the offending party has the opportunity to avoid them if it ceases violating the court's orders.

Thus, in reviewing the award against Operation Rescue for each subsequent daily violation of the trial court's injunction, the Second Circuit held in *New York State National Organization for Women v. Terry*:

[T]here is no doubt that the sanctions were entirely conditional and coercive. . . . The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties then-existing legal rights Faced on May 5, 1988 with a choice between compliance or non-compliance with the district court's order, defendants chose the latter course.

. . . Thus, since the sanctions were imposed to compel obedience to a court order they are *civil* in nature.

886 F.2d at 1351 (emphasis added). This Court denied certiorari. 495 U.S. 947 (1990).

Both the Third and the Ninth Circuits have likewise held that fines imposed according to a prospective fine schedule and intended to coerce compliance with the court's injunction against unlawful conduct are "civil" within the meaning of *Gompers* and *Hicks*. *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990); *Aradia Women's Health*

Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991). See also *NOW v. Operation Rescue*, 1993 U.S. Dist. LEXIS 2972 (D.D.C. Mar. 15, 1993).

Similarly, in upholding fines imposed under a prospective schedule against the former air traffic controllers' union for its violation of an injunction against continuing a strike, the United States District Court for the District of Columbia concluded that the argument that such fines were "punitive, rather than coercive, [was] meritless." *United States v. PATCO*, 110 LRRM 2858, 2864 (D.D.C. 1982) (emphasis added).

Finally, in a case involving the very same UMW strike at issue in the present petition, the United States District Court for the Western District of Virginia opined that "fines assessed under a prospective fine schedule issued in an effort to halt prohibited conduct certainly appear to fall within the Supreme Court's definition of civil contempt fines." *Clark v. International Union, UMW*, 752 F.Supp. 1291, 1297 n. 7 (W.D.Va. 1990).

Significantly, petitioners do not cite a case from any jurisdiction that conflicts with these cases on the only federal issue genuinely presented – whether fines imposed under a prospective fine schedule to coerce a defendant to cease violating a court order are civil within the meaning of *Gompers* and *Hicks*. Petitioners' failure to identify any conflict on this issue militates strongly against further review.

D. *Gompers* and *Hicks* Do Not Establish a Rigid, Bright-Line Rule that a Contempt Sanction is Criminal Merely Because it was Imposed for a Violation of a "Prohibitory" Order.

The Virginia Supreme Court rejected petitioners' argument that, despite the conditional, coercive nature of the fines imposed on the union under the prospective fine schedule, those fines were criminal *merely* because the underlying injunction violated by the Union "prohibit[ed] the doing of an act," rather than required the

Union "to perform an affirmative act." 244 Va. at 477, 423 S.E.2d at 357 (App. 15a). (Emphasis deleted).

According to petitioners, *Gompers* and *Hicks* establish that *whenever* contempt fines are imposed for violation of a "prohibitory" order – i.e., an order that prohibits the defendant from taking certain action – rather than for violation of a "mandatory" order – i.e., an order directing the defendant to perform an affirmative act – the fines are exclusively punitive, and hence criminal, in nature. Petitioners claim that the lower courts are in revolt against this rule, and that this Court should grant the petition for certiorari in this case to bring the lower courts back in line with *Gompers* and *Hicks*.

For several reasons, petitioners' reliance on a rigid, bright-line "prohibitory/mandatory" distinction is unavailing.

First, neither *Gompers* nor *Hicks* makes the "prohibitory/mandatory" distinction the *sine qua non* of the difference between civil and criminal contempt. To be sure, in *Gompers*, this Court stated that "[t]he distinction between refusing to do an act commanded, – remedied by imprisonment until the party performs the required act –; and doing an act forbidden, – punished by imprisonment for a definite term –; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment." 221 U.S. at 443 (emphasis added). But that this distinction is "generally" sound, and that it provides "a" test for distinguishing between civil and criminal contempt, does not mean that it is the *exclusive, rigid, bright-line* determinant of the difference.

This Court's statement in *Gompers* must be understood in the context in which it was made. The Court was addressing the nature of imprisonment for a definite term for violation of a prior order not to engage in certain conduct. In that situation, the contempt is criminal because there is generally nothing the defendant can do to avoid the sanction, once announced; thus, the contempt is more exclusively punitive in nature. The *Gompers* Court was *not*, however, addressing the situation where,

by reason of a prospective sanctions schedule set up only after finding that the defendant had violated a prohibitory order, the defendant is afforded the opportunity to avoid the specified sanctions by ceasing its violation. In that situation, where the defendant effectively "carr[ies] the keys of [his] prison in [his] own pockets," *Hicks*, 485 U.S. at 633, the fine schedule is more coercive than punitive, and hence the contempt is more properly classified as civil.

Rather than setting up a mechanical formula, *Gompers* and *Hicks* make clear that the ultimate inquiry in deciding between civil and criminal contempt requires a careful assessment of the "character and purpose" of the contempt sanction imposed. *Gompers*, 221 U.S. at 441. See also *Hicks* ("[T]he critical features [of the difference between civil and criminal contempt] are the substance of the proceeding and the character of the relief that the proceeding will afford"). A prospective fine schedule is no less coercive (and hence civil) because it seeks to encourage the contemnor to refrain from prohibited action rather than take required action. Plucked wholly out of context and elevated to a formalistic, bright-line rule, as petitioners use it, the "prohibitory/mandatory" notion is indeed a "distinction without a difference." 244 Va. at 477, 423 S.E. 2d at 357 (App. 15a).

Second, it is significant that petitioners do not identify a single case from any jurisdiction interpreting *Gompers* and *Hicks* as establishing a bright-line rule based on whether the underlying injunction was "mandatory" or "prohibitory." Rather, petitioners concede that lower federal courts have held that the statements in *Gompers* and *Hicks* relied on by petitioners were "not intended to be a dispositive test." *Latrobe Steel Co. v. United Steel Workers*, 545 F.2d 1336, 1343 n. 27 (3d Cir. 1976) (citing *Shakman v. Democratic Organization of Cook County*, 533 F.2d 344 (7th Cir.), cert. denied, 427 U.S. 858 (1976)).

Indeed, innumerable decisions which have held that fines imposed under a prospective schedule are generally

civil in nature involved injunctions that were "prohibitory" in character. And numerous other cases have recognized that a court may employ prospective civil fines in a prohibitory setting. For example, the Fifth Circuit has held:

A party may be held in contempt if he violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order. The civil contempt sanction is coercive rather than punitive and is intended to force a recalcitrant party to comply with a command of the court.

Whitfield v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987), cert. denied, 487 U.S. 1205 (1988) (emphasis added). See also *Clark*, 752 F. Supp at 1297; *Labor Relations Comm'n v. Fall River Educators Assoc.*, 382 Mass. 465, 475-76, 416 N.E. 2d 1340, 1347 (Mass. 1981) (fine for civil contempt imposed where judge announced a fine would be levied for each day of illegal strike); *NOW v. Operation Rescue*, 1993 U.S. Dist. LEXIS 2972 (D.D.C. Mar. 15, 1993) (civil contempt fine levied against violators of injunction forbidding interference with medical facilities and providing for fine for each violation).

Even the one case described by petitioners as a "lucid and persuasive counter-example" (Pet. at 14) of the scores of decisions that undermine their position – *In re Contempt of Dougherty*, 429 Mich. 81, 413 N.W.2d 392 (Mich. 1987) – expressly recognizes that the mandatory/prohibitory dichotomy is *not* the bright-line determinant of the difference between civil and criminal contempt:

However, the test for distinguishing between refusing to do an act commanded, which would permit a coercive remedy, and doing an act forbidden, allowing only punishment for the completed act of disobedience, affords *only a general test* to determine the character of the punishment. The Supreme Court itself recognized that this test was *not* "universal[]." See *Gompers*, *supra*.

413 N.W.2d at 398 (emphasis added).

The odd conclusion that petitioners draw from the fact that virtually no decisions from any jurisdiction support their extreme reading of *Gompers* and *Hicks* is that the lower courts are in mass revolt and that this Court must stop the revolution. The more natural conclusion to be drawn from the absence of support for petitioners' position is that petitioners are overreading *Gompers* and *Hicks* and that there is no revolution under way.

Third, this Court has itself approved civil coercive sanctions assessed in cases where the contemnor failed to comply with a prohibitory order. For example, in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court upheld civil remedies imposed on a company that had been ordered to stop violating wage and hour laws. When the company failed to comply, the Administrator brought a contempt action and the court imposed financial sanctions payable to affected, non-party employees. This Court approved the remedial, civil sanctions. *Id.* at 193.

Similarly, in *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), this Court upheld the use of civil contempt sanctions imposed against a union to coerce compliance with a court order to cease all discrimination and enact certain affirmative action programs. The Court approved the use of the sanctions even though the underlying orders mainly prohibited conduct.⁴

Fourth, the effect of petitioners' bright-line "mandatory/prohibitory" dichotomy would be radical and absurd. If the mere fact that a contempt fine were imposed for a party's violation of a prohibitory injunction was enough to make the fine criminal, then courts would be deprived of one of the most effective means of securing compliance with their orders – namely, the setting of a prospective fine schedule for continued violation of

⁴ In addition, in *Department of Energy v. Ohio*, 503 U.S. ____ 118 L.Ed. 2d 255, 270 (1992), this Court cited with approval several cases in which prospective civil coercive contempt fines were used in the same manner as they were used here – to secure compliance with a prohibitory injunction.

their prohibitory orders. In petitioners' new world, a prospective fine schedule would be unworkable in practice because the court would have to conduct a collateral criminal proceeding to try to coerce compliance with its orders. Nothing in *Gompers* or *Hicks* requires handicapping the courts in that fashion.

In addition, there is no apparent principled justification for limiting petitioners' proposed rule to judicially-imposed fines. If the difference between a civil and criminal fine lies in the nature of the underlying command that it seeks to vindicate, why would not a legislatively-imposed or administratively-imposed fine for prohibited conduct also be considered "criminal"? For example, under petitioners' theory, why would not a fine imposed by the Environmental Protection Agency for dumping garbage in a manner prohibited by statute automatically become a criminal fine, requiring full-blown criminal procedures? Or, why would not a financial sanction by the Occupational Health and Safety Administration for a violation of its orders or regulations also be automatically deemed criminal? For that matter, why would not all parking fines automatically become criminal? Carried to its logical conclusion, petitioners' rigid "mandatory/prohibitory" distinction would, in one fell swoop, invalidate so many statutorily-authorized mechanisms for imposing civil fines as to defy meaningful estimate.

Fifth, in any event, this case does not cleanly present the "mandatory/prohibitory" issue. It is remarkable that petitioners emphasize the alleged "mandatory/prohibitory" dichotomy without even mentioning that the injunctive orders in this case sought not only to stop the Union from violating the law, but also directed the Union to take affirmative action to inform its members and sympathizers to do likewise.

For example the injunctive orders issued by the trial court directed the Union affirmatively to:

(1) place a designated supervisor or captain at each picket site to enforce the injunction;

(2) make available the names of strike supervisors to law enforcement authorities;

(3) report to the court in writing on all violations of the injunction; and

(4) use all lawful means reasonably available to them to ensure compliance with the injunction. (App. 115a-116a, 120a).

The Union failed to comply with any of these affirmative obligations.

The existence of these "affirmative" aspects to the court's injunction is important in two respects. First, it undermines the usefulness of petitioners' rigid dichotomy between "mandatory" and "prohibitory" injunctions as a basis for determining whether a given contempt fine is civil or criminal. For, as is the case here, had the Union complied with the affirmative acts demanded by the order, many, if not all, of the so-called prohibited acts of contempt would not have occurred. Second, in any event, the fact that the injunction in this case included both "mandatory" and "prohibitory" directives renders this case a poor vehicle for considering the appropriateness of the bright-line rule that petitioners propose, since even if petitioners prevailed on their legal theory it would not necessarily result in reversal of the judgment.

* * *

In sum, all of the traditional considerations that guide this Court's exercise of discretion militate strongly against review to consider whether petitioners' mechanical "mandatory/prohibitory" dichotomy requires a different result in this case.

II. THE VIRGINIA SUPREME COURT'S DECISION THAT THE SUBSEQUENT SETTLEMENT OF THE UNDERLYING LITIGATION IN THIS CASE DID NOT MOOT THE CIVIL CONTEMPT FINES PAYABLE TO THE STATE AND COUNTIES IS A MATTER OF STATE, NOT FEDERAL, LAW.

The Virginia Supreme Court held that state law, not federal law, governed the question whether the settlement of the underlying litigation in this case necessarily mooted the civil contempt fines assessed under the prospective fine schedule that were payable to the Commonwealth of Virginia and the two affected counties. 244 Va. at 478, 423 S.E.2d at 358 (App. 16a). That is correct; therefore Question 2 is not an appropriate matter for review by this Court.

Whether the settlement of civil litigation divests the courts of the Commonwealth of the power to uphold civil coercive fines which arose during the litigation raises no issue of federal law. It has been widely recognized that contempt orders issued by state courts are matters of state law. *Torres Irizarry v. Toro Goyco*, 425 F. Supp. 366, 369 (D. Puerto Rico 1976) (the contended invalidity of a contempt judgment issued by a court of the Commonwealth of Puerto Rico involved matters concerning "the power of [the courts of Puerto Rico] to punish for contempt. They have been presented to the highest court of the Commonwealth, which disposed of [the] contentions"); *Keegan v. Lawrence*, 778 F. Supp. 523, 526 (S.D. Fla. 1991) (Florida law deemed applicable to state court civil contempt proceedings).

This Court has also recognized that "[t]he contempt power lies at the core of the administration of a State's judicial system. . . . [F]ederal court interference with the State's contempt process is 'an offense to the State's interest.' . . . [Contempt] stands in aid of the authority of the judicial system, so that its orders are not rendered nugatory." *Juidice v. Vail*, 430 U.S. 327, 335-336 & n. 12 (1977), citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). See also *Orr v. Orr*, 440 U.S. 268, 275 n. 5 (1979) (recognizing

that the survival of a state court contempt judgment "depends upon the resolution of somewhat knotty state-law problems.")

Where the operation of a state's contempt power runs afoul of no federal statutory or constitutional provision, the federal courts have no basis to intervene. Here, whether vested civil contempt fines survive settlement by the parties raise only state-law policy questions. Neither Article III standing requirements nor due process concerns are in any way meaningfully implicated by a state's decision to follow one rule or another on this issue. Accordingly, whether the fines became moot is a state law question that is not proper for review by this Court. For the same reason, all of the cases cited by petitioners in support of their view that the fines are moot are irrelevant. None of these cases involves the law of Virginia. Where matters of state law are involved, as they are here, it is well settled that the highest court of the state is the final arbiter of that law. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). The Supreme Court of Virginia has held that the fines here were not mooted by the settlement of the underlying litigation, and that decision is unaffected by other courts' rulings on this issue.

Even if, however, federal law governed the question of whether the coercive civil fines survive settlement of the underlying litigation, the decision below does not warrant review by this Court. As the Virginia Supreme Court correctly recognized, its decision, although resting on state law, is not inconsistent with *Gompers*.

In *Gompers*, which involved a federal action, the Supreme Court held that the settlement of the underlying litigation mooted the civil plaintiffs' claim for recovery of compensatory, civil fines assessed against the defendant union. But *Gompers* recognizes that the purpose of civil contempt fines may be either "remedial" or "coercive." See 221 U.S. at 442. Where a civil contempt fine is purely "remedial," it is paid to the complainant. See *id.* at 441.

But a civil contempt fine may also be more purely "coercive," in which case it is paid to the court or to the state. *Gompers* dealt only with whether a "compensatory" or "remedial" civil fine – payable to the complaining party – was mooted by reason of the settlement of the underlying litigation. That obviously does not foreclose the survival of fines payable to the court or the state.

There are plainly important and legitimate policy reasons for a different rule for "coercive" civil fines payable to the state. For, as the Virginia Supreme Court correctly held (albeit as a matter of state law):

Courts . . . must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained. If we were to adopt the Union's mootness contention, any organization which faced coercive, contempt fines would know that, in order to completely avoid payment of the fines, it only had to postpone actual collection of the fines until settlement of the underlying litigation.

244 Va. at 478, 423 S.E.2d at 358 (App. 17a). A rule that allowed the party in contempt to moot coercive fines payable to the court or the state would totally undermine the effectiveness of civil contempt fines intended to coerce a party to comply with the court's legitimate orders.

Thus, even if the mootness question presented a question of federal law, which it does not, the Virginia Supreme Court's decision is consistent with both logic and precedent.

III. THE VIRGINIA SUPREME COURT'S DECISION THAT THE CONTEMPT FINES IN THIS CASE DO NOT VIOLATE SUBSTANTIVE DUE PROCESS DOES NOT WARRANT REVIEW BY THIS COURT, NOR SHOULD THE PETITION BE HELD FOR *TXO PRODUCTION CORP. V. ALLIANCE RESOURCES* OR *AUSTIN V. UNITED STATES*.

The union argued below that the civil contempt fines in this case are "so excessive that they violated

substantive due process and federal labor policy." 244 Va. at 479, 423 S.E.2d at 358 (App. 18a). The Virginia Supreme Court held that the fines were "not . . . excessive as a matter of law," for the following reasons: (i) "the record discloses that the Union committed more than 500 separate violations of the trial court's injunction[;]" (ii) the fines are not excessive in light of "the magnitude of the injunction violations[;]" (iii) the fines are not excessive in light of "the Union's vast financial resources[;]" and (iv) the fines are not excessive in light of the fact that "the Union never represented to the court that it regretted or intended to cease its lawless action." 244 Va. at 479-80, 423 S.E.2d at 358 (App. 18a-19a).

This holding presents no certworthy issues:

First, while the Virginia Supreme Court's decision expressly held that the fines in issue were not excessive, the Court was not called upon to address the question of whether the Excessive Fines Clause of the Eighth Amendment applies either to the States generally or to court-imposed civil contempt fines in particular. The decision below addresses only the Union's contention that the fines "are so excessive that they violate *substantive due process and federal labor policy*." 244 Va. at 479, 423 S.E.2d at 358 (App. 18a). The decision below, therefore, raises no issue about the application of the Excessive Fines Clause of the Eighth Amendment to the states or to court imposed civil contempt fines.

Second, the Virginia Supreme Court's conclusion that the fines are not "excessive as a matter of law" is consistent with the broad proportionality principles discussed by this Court in cases such as *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). The decision below holds that the fines imposed, while "large," are not disproportionate to the number of violations committed by the Union; the magnitude of the violations (most of which involved violence); and the Union's "vast financial resources." 244 Va. at 480, 423 S.E.2d at 358 (App. 18a-19a). Moreover, the Virginia Supreme Court found that the large fines are justified and

necessary in this case because "the Union never represented to the court that it regretted or intended to cease its lawless actions." *Id.* This analysis is thoroughly consistent with the proportionality analysis approved in *Haslip*, and, at most, presents an unremarkable application of those principles.

Indeed, the fact that the sanctions imposed reached high amounts is simply reflective of the unprecedented level of scorn with which the strikers treated the injunctions. See *Madden v. Grain Elevator, Flour & Feed Mill Wkrs., etc.*, 334 F.2d 1014, 1022 (2d Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

Nor is there any reason to hold this petition pending disposition of either *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992), or *Austin v. United States*, No. 91-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993). TXO involves two particular questions that are not meaningful in this case. First, TXO concerns what procedures are required, in terms of jury instructions and post-trial and appellate remittitur review, to confine unbridled jury discretion. Obviously, those procedural questions have no genuine relevance to contempt proceedings. Second, TXO concerns the substantive limitations on jury awards adopted by the Supreme Court of West Virginia, based on the difference between "stupid" and "mean" defendants. The legitimacy or utility of those substantive limitations have no bearing on the question of how much money is reasonably required to achieve compliance by a recalcitrant party.

Austin is similarly distant in its relevance to this case. In *Austin*, the Court may decide whether the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture actions brought by the government. But the decision below holds *nothing* about the application of the Excessive Fines Clause. Rather, it addresses only (and briefly) the Union's challenge under "substantive due process and federal labor policy." 244 Va. at 479, 423 S.E.2d at 358 (App. 18a). Moreover, the proportionality

concerns applicable to civil forfeiture, which is designed to punish the defendant for his wrongdoing, is not directly relevant to the issue in this case – how much money is reasonably necessary to make the Union comply with court's orders.

In addition, both *TXO* or *Austin* could not be controlling of this case for a more basic reason. Both of those cases involve proportionality as it relates to *punishment for completed conduct*. This case, by contrast, relates to the amount of money that is necessary to *coerce* a defendant to stop *ongoing conduct*. The difference, which is the same difference that separates "civil" from "criminal" contempt, is an important one. Similarly, what is proportional as *punishment* in *TXO* and *Austin* has no meaningful relationship to what is necessary to *coerce* (rather than punish) a defendant into compliance with court orders.

In sum, *TXO* and *Austin* have no real relevance to what a court can do to achieve compliance with its orders. Further review of the Union's excessiveness claim is, therefore, unwarranted.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 92-1625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
v. *Petitioners,*

JOHN L. BAGWELL; CLINCHFIELD COAL CO.; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

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ARGUMENT

In tacit recognition that the questions presented in the *certiorari* petition *are* substantial and the reasons for granting the petition stated therein *are* telling, the brief in opposition labors on for 30 pages—the maximum permitted by this Court's rules—in an effort to show that the decision below is clearly correct and is of little moment.

On analysis of those many pages, what the opposition brief does is to confirm our contention that, as to the first question presented, the Virginia Supreme Court's decision—and the decisions cited therein—rest on a *rejection* of this Court's jurisprudence setting out the constitutional line between civil contempt and criminal contempt and offers as a substitute a clearly inferior juris-

prudence; and to obfuscate rather than to confront the issues posed by the second and third questions presented.

A. The Mandatory/Prohibitory Dichotomy

The opposition brief—while expending much ink and effort—fails to rebut our basic point that: (a) the law in this Court is that, in determining the essential nature of a contempt proceeding, a mandatory/prohibitory dichotomy is “sound in principle, and generally, if not universally, affords a test by which to determine the [civil or criminal] nature of the punishment,” *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 443 (1911); *Hicks v. Feiock*, 485 U.S. 624, 631 (1988); and (b) the lower court’s decision in this case—which states that this Court’s mandatory/prohibitory dichotomy “presents a distinction without a difference”—is symptomatic of the general propensity in the lower courts to treat the governing rules stated by this Court as an irrelevance. Compare Pet. at 16-18 with Opp. Br. at 16-22.¹

¹ In what is obviously a red herring, respondent suggests that “this case does not clearly present the mandatory/prohibitory issues.” Opp. Br. at 23-24. The thrust of respondent’s argument is that even if this Court were to hold that the trial judge unlawfully imposed civil contempt sanctions against the Union for violating *prohibitory* directives, that would not change the result in this case because the Union was held in contempt for violating *both* mandatory and prohibitory directives. This argument misapprehends the facts and the law.

Of the \$52 million in contempt fines respondent seeks to collect, a *maximum* of \$7.1 million could even arguably have had anything to do with findings concerning violations of mandatory directives. See App. 55a, 61a, 64a, 71a, 83a, 97a, 102a. We submit that a stake of \$45 million makes this case one which provides a more than adequate base for addressing the continuing vitality of the mandatory/prohibitory dichotomy.

And, even assuming—contrary to fact—that the Union was fined \$52 million for an indivisible mixture of violations of mandatory and prohibitory directives, the full amount of such fines would have to be vacated if this Court determined that any significant portion was imposed without observance of constitutionally-required procedures, as obviously would be the case here where the overwhelming majority of the judicial directives violated were prohibitory.

Indeed, pp. 16-22 of the opposition brief—which set out the lower court cases that have made this trend—provides chapter and verse for the proposition that those decisions are studies in evading *Gompers*’ and *Hicks*’ plain lesson rather than in elaborating or applying that lesson. Having said that much, we hasten to add that respondent’s assertion that there is uniformity of approach and result in the lower court decisions on the proper characterization of contempt proceedings growing out of violations of prohibitory injunctions is misleading.²

It is equally to the point that the opposition brief is conspicuously silent regarding our demonstration of the important constitutional purposes served by the mandatory/prohibitory dichotomy. The dichotomy, as we have explained, limits a judge’s discretionary authority to impose contempt sanctions through civil contempt proceedings—proceedings in which *none* of the constitutional requirements for a criminal proceeding need be followed—to the *narrow class of situations* in which a party is presently in violation of a court order to perform discrete affirmative acts within a discrete time period specified therein. Those situations are singular in providing a particularly strong justification for swift procedures and flexible remedies, in allowing the defendant to bring an end to the punishment (and to purge himself of contempt) at any

² While the *trend* in the lower courts is to the contrary, the lower courts have neither uniformly rejected the mandatory/prohibitory dichotomy, see *In re Contempt of Dougherty*, 429 Mich. 81, 413 N.W.2d 392 (Mich. 1987), nor uniformly embraced the view that the imposition of prospectively-set, coercive contempt fines constitutes civil contempt, see *Crozier-Chester Med. Center v. Moran*, 560 A.2d 133 (Pa. 1989) (holding that imposition of scheduled fines for future violations of court’s prohibitory order constitutes criminal contempt). And, while the lower courts generally conclude that the imposition of prospectively-set sanctions to coerce compliance with a prohibitory injunction is civil contempt, this result is reached via reasoning that is far from uniform, see Pet. at 16-18.

time through compliance, and in being foreign to the traditional law of crimes.

Thus, the dichotomy ensures that a clear boundary between civil contempt and criminal contempt is maintained and that the lower courts' demonstrated tendency to expand civil contempt at the expense of criminal contempt is cabined. *See* Pet. at 12-14, 18.

In place of *Gompers* and *Hicks*, the opposition brief—and the lower court decisions cited therein—would have it that where a party violates a prohibitory order that sets out a stated penalty for its breach, the judge may impose that penalty in civil contempt proceedings, but that where a party violates a prohibitory order that does not state a penalty for its breach, criminal procedures must be provided before sanctioning the wrongdoer. Opp. Br. at 15-18.

There is, we readily admit, a distinction between imposing a scheduled penalty following a violation of a court order and imposing an unscheduled penalty following such a violation. The two are not so similar as to be one for all purposes. But that distinction is *not* generated by—and does *not* provide—any principled basis for distinguishing civil contempt from criminal contempt grounded in the history or the logic of constitutional due process, of contempt law or of the civil law and the criminal law in general.

To the contrary, history teaches that the imposition of scheduled penalties for specified prohibited conduct is generally the province of the *criminal* law. And, this Court's decisions teach that the province of the criminal law is generally the province of *criminal contempt*. *See* Pet. at 13. The proposition that the fines here were scheduled, then, provides no reasoned basis for the proposition that the contempt proceedings here are properly characterized as civil.³

³ Contrary to respondent, Opp. Br. at 23, the justification for limiting application of the mandatory/prohibitory dichotomy to

In sum, the scheduled fine/unscheduled fine dichotomy embraced by the Virginia Supreme Court—and by the respondent—is a classic example of the distinctions without a difference that characterize bad law.

B. The Continued, Public Prosecution of "Civil" Contempt Orders After The Final Settlement Of The Main Civil Action

As explained in our petition, under the principles stated in *Gompers*, *supra*, 221 U.S. at 441, and *Hicks*, *supra*, 485 U.S. at 631—and under *Gompers*' square holding—a civil contempt proceeding, as a proceeding to further the remedial ends of a private civil complainant, *must by its nature end with the full settlement of all underlying civil claims*; the proceeding may not, within its civil character, be taken over by a court to be independently prosecuted solely to further the purpose that is the traditional province of *criminal* contempt, *viz.*, to vindicate the court's own authority.⁴ And, as we also explained, the decision of the court below—empowering the courts of Virginia to take over a fully settled civil contempt case for just such continuing and independent prosecution by a court appointed officer—is in the plainest conflict with

judicially-imposed contempt sanctions is both "apparent" and "principled." Unlike judges in contempt proceedings, legislatures or administrative agencies imposing fines for prohibited conduct are not acting as judges in their own cause, seeking to prevent or remedy what may be perceived to be a personal disrespect or insult. *See Bloom v. Illinois*, 391 U.S. 194, 202 (1968) ("[c]ontemptuous conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament").

⁴ *See, e.g., Gompers*, 221 U.S. at 452; (a civil contempt proceeding, unlike a criminal contempt proceeding, "necessarily end[s] with the settlement of the main cause of which it is a part"); *id.*, at 445 (civil contempt proceedings, unlike criminal contempt proceedings, are "treated as a part of the original cause in equity" because the private civil complainant prosecutes the case "in its own right . . . and not as a representative of the [government] prosecuting a case of criminal contempt; criminal contempt proceedings, in contrast, are "between the public and the defendant, . . . with the defendant on one side and the court vindicating its authority on the other").

Gompers. The decision below, moreover, is indicative of a trend of lower court decisions holding that, notwithstanding *Gompers*, courts *do* have the authority to independently prosecute *civil* contempt proceedings solely to vindicate their own authority. See Pet. at 26-28 (reviewing recent lower court decisions).

That the instant contempt actions are now being prosecuted *solely* to vindicate the authority of the trial court is most clearly demonstrated by the fact that respondent Bagwell—the court appointed officer who was not a party in the original civil action—appears to be the *only* respondent to have filed any brief in this Court in response to the petition. The private-party respondents—each of whom has fully settled all original claims—although served with the petition, have expressed no continued interest in the case.

Nevertheless, less than three pages of the opposition brief are devoted to the issues presented by the full settlement of the original civil action. See Opp. Br. at 25-27. This becoming reticence is easily explained in that none of the points made there have any merit.

1. Respondent's principal argument is that no federal question at all is raised by the state practice at issue here because a state may adopt its own rules of mootness, which need not accord the same significance to civil settlements as would the federal law of mootness. Opp. Br. at 25-26. This argument ignores the nature of the federal question presented in the petition.

The federal question we present does *not* rest on any novel view that the federal law of mootness must apply to the states. Rather, that question rests on the well-established principle that the states must respect federal due process rights and, because of that obligation, must respect the constitutional distinction between contempt proceedings that are in their essential character civil (because the proceedings are "remedial, and for the benefit of the complainant") and contempt proceedings that are in their essential character criminal (because the pro-

ceedings are "punitive, to vindicate the authority of the court"), *Gompers, supra*, 221 U.S. at 44; *Hicks, supra*, 485 U.S. at 631.

This Court has been unmistakably clear that in the context of state contempt proceedings, "the characterization of [a] proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law." *Hicks, supra*, 485 U.S. at 630.

All this being so, the argument that we have failed to raise a substantial federal question is not even colorable.⁵

⁵ The three decisions of this Court cited in the opposition brief to support the argument that no federal question is raised by the trial court's independent prosecution of contempt proceedings after the settlement below are wholly irrelevant to any point at issue here.

First, Juidice v. Vail, 430 U.S. 327, 335-36 & n.12 (1977), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), are cited for the proposition that federal courts may not interfere with state contempt processes, implying that those processes may be administered without regard to this Court's law regarding the proper bounds of criminal and civil contempt. Opp. Br. at 25. But neither of these cases in any way question the applicability of federal due process law to state contempt proceedings. Rather, both concern the procedural propriety of federal courts directly enjoining pending state contempt proceedings. Far from freeing state courts from the substantive rules of federal due process law, those cases disapproved of such federal injunctions precisely because state courts *were* fully bound by—and could be trusted to follow—the substance of federal due process law. See, e.g., *Juidice*, 430 U.S. at 336-337; *Huffman*, 420 U.S. at 604.

Second, taking language from *Orr v. Orr*, 440 U.S. 268, 275 n.5 (1979) entirely out of context, the opposition brief (at 25) asserts that the case "recogniz[es] that the survival of a state court contempt judgment 'depends upon the resolution of somewhat knotty state-law problems.'" The cited discussion in *Orr* concerned only the issue of whether the state law regarding stipulations might provide an adequate and independent basis for upholding the validity of a particular civil contempt judgment that had been imposed on the basis of an allegedly unconstitutional statute, since the defendant had specifically entered a stipulation that he would perform the obligations at issue. The case exclusively concerned the constitu-

2. The opposition brief next argues, in one brief paragraph, that “[e]ven if, . . . federal law governed” the issue here, the rule of *Gompers* would have no application since that case involved a “compensatory” contempt order that was “remedial” in nature, not a “coercive” contempt order that need not be “remedial.” See Opp. Br. at 27-28.

While respondent simply ignores the petition, we had anticipated this argument—which rests on the erroneous premise that “coercive” civil contempt orders need not be “remedial” in nature—and had demonstrated its fatal flaw. Since the opposition brief offers no surrebuttal we set out that portion of the petition in the margin for the Court’s convenience.⁶

3. Finally, respondent asserts, quoting the opinion below, that “[c]ourts . . . must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained.” Opp. Br. at 27 (quoting Pet. App.

tionality of the statute in question and had absolutely nothing to do with any issue relevant to the instant case.

⁶ The entirety of the Virginia Supreme Court’s effort to distinguish *Gompers* in this regard is that court’s brief assertion that the monetary relief at issue in *Gompers* was “compensatory relief to be paid to the complainant,” so that *Gompers* did not involve “coercive, civil contempt sanctions.” App. 18a.

The *Gompers* opinion, however, does not even hint that a distinction between different kinds of civil contempts should make a difference regarding the ability of the parties to settle their dispute. To the contrary, *Gompers* rests its conclusion regarding the effect of settlement on the proposition that civil contempt—as distinct from criminal contempt—is a “remedial” proceeding, “for the benefit of the complainant,” and not a proceeding “to vindicate the authority of the court” [221 U.S. at 441.] And, the *Gompers* Court made it quite clear that this distinction obtains where the civil contempt order can be termed “coercive” and where it can be termed “compensatory.” Such a “coercive” civil contempt order is “not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do” and thereby benefiting the civil complainant. 221 U.S. at 442. [Pet. at 21-22.]

17a). A rule that private parties could settle such civil contempts, according to respondent, “totally undermines the effectiveness of civil contempt fines intended to coerce a party to comply with the court’s legitimate orders.” Opp. Br. at 27.

Far from undercutting the points in our petition, this alarmist argument illustrates the need for this Court’s review. It is *this Court’s* jurisprudence that when a judge exercises contempt power solely to uphold the authority and dignity of the court, the judge is exercising *criminal* contempt power. See Pet. at 20-23. The fact that the *Constitution* grants a defendant added procedural protections when faced with a trial judge’s determination to invoke the criminal contempt power neither renders the criminal contempt power ineffective nor justifies a license to the trial courts to substitute civil contempt as a less burdensome alternative.

The insistence that a trial judge must be able to avoid the restrictions inherent in criminal contempt whenever the court believes it necessary to do so to vindicate its authority and dignity is nothing but an insistence that the constitutional balance that underlies criminal contempt, as this Court has set that balance, be set askew. And, the assumption that the dignity of the courts will be jeopardized by respecting the due process rights of those who are accused of undermining judicial authority is an unworthy assumption that this Court has squarely rejected:

We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked

out over the centuries. [*Bloom v. Illinois*, 391 U.S. 194, 208 (1968).]⁷

CONCLUSION

For the reasons stated in the petition for a writ of *certiorari* and in this reply brief, the petition should be granted.

⁷ Respondent's treatment of our third question presented—which raises issues under the Eighth and Fourteenth Amendments relating to the excessiveness of the \$52 million in contempt fines levied in this case—consists of misstating the record and misstating our claims. Starting from these misstatements, respondent argues that the cases currently pending before this Court that raise excessive fines issues are wholly unrelated to the instant case. See *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992) (raising issues regarding what might constitute excessive fines under the Due Process Clause of the Fourteenth Amendment); *Austin v. United States*, No. 92-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993) (raising issues regarding what might constitute excessive fines under the Excessive Fines Clause of the Eighth Amendment).

First, respondent asserts that the courts below were “not called upon to address the question” of whether these fines violated “the Excessive Fines Clause of the Eighth Amendment.” Opp. Br. at 28; see also Opp. Br. at 29. This assertion is wrong. Petitioners *expressly raised* this very issue in the proceeding below. See Brief for Appellant, Supreme Court of Virginia, Record No. 92-0299, at 21 n.23 (“By parity of reasoning [to the issue raised by petitioners concerning excessive fines under the Due Process Clause of the Fourteenth Amendment], the fines imposed are so unreasonably large as to violate the excessive fines clauses of the Eighth Amendment to the United States Constitution.”).

Second, respondent notes a variety of arguable factual differences between the instant case, on the one hand, and *TXO Production Corp.* and *Austin* on the other. The point that respondent ignores, however, is the *only* point of consequences, and the *only* point we argued, *viz.*, that the instant case raises excessive fines issues that, whatever the differences may be, are closely related to those raised by *TXO* and *Austin*, so that proper evaluation of the excessive fines issues raised by this case should benefit from, and therefore should await, this Court's dispositions of the issues in *TXO* and *Austin*.

Respectfully submitted,

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AUG 6 1993

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Petitioners,
v.

JOHN L. BAGWELL; CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

JOINT APPENDIX

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Record No. 920299

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Appellant,

against

CLINCHFIELD COAL COMPANY, *et al.*,
Appellees.

RELEVANT DOCKET ENTRIES

Date	Proceedings
	Order entered on March 6, 1992
March 27, 1992	Trial court record Manuscripts (5 vols.) Transcripts (16 vols.) Exhibits (4 envs. & 3 folders) Picket report (2 folders) Appendix (4 vols.) Appellants' brief (1 vol.) Amicus Curiae (1 vol.) Reply brief (1 vol.) Appendix of cases (1 vol.)
April 15, 1992	Appendix (2 vols.) Order entered on May 14, 1992 Order entered on June 8, 1992 Letter from Clerk's Office to counsel, dated August 14, 1992 Letter from Clerk's Office to counsel, dated August 28, 1992

Date	Proceedings
	Opinion rendered on November 6, 1992
	Order entered on November 6, 1992
November 16, 1992	Notice of intention to apply for rehearing
December 7, 1992	Petition for rehearing
	Order entered on January 8, 1993
August 2, 1993	Record from Court of Appeals
	Manuscript (1 vol.)
	Appendix (4 vols.)
	Appellants' brief (1 vol.)
	Amicus curiae (1 vol.)
	Reply brief (1 vol.)
	Appendix of cases (1 vol.)

I, David B. Beach, Clerk of the Supreme Court of Virginia, certify that the papers listed above and filed herein are the original papers and copies of orders entered in the above-styled case.

David B. Beach, Clerk

By:
Chief Deputy Clerk

* * * *

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Record No. 910634

JOHN L. BAGWELL, SPECIAL COMMISSIONER,
Appellant,
against

INTERNATIONAL UNION, UNITED MINE WORKERS OF
AMERICA AND INTERNATIONAL UNION, UNITED MINE
WORKERS OF AMERICA, DISTRICT 28,
Appellees.

RELEVANT DOCKET ENTRIES

Date	Proceedings
April 24, 1991	Petition for appeal
	Order entered on May 24, 1991
July 12, 1991	Record from trial court and Court of Appeals
	Manuscripts (11 vols.)
	Transcripts (35 vols.)
	Exhibit (9 envs., 3 vols. and 1 box)
	Picket reports (1 env. and 1 folder)
	Misc. evidence (1 group)
	Appendix (9 vols.)
	Appellant's brief (1 vol.)
	Appellee's brief (1 vol.)
	Reply brief (1 vol.)
	Amicus curiae (1 vol.)
	Petition for appeal (2 vols.)
	Order entered on November 7, 1991
	Order entered on November 22, 1991

Date	Proceedings
	Order entered on March 5, 1992
April 14, 1992	Appendix (1 vol)
	Order entered on May 20, 1992
	Opinion rendered on November 6, 1992
	Order entered on November 6, 1992
November 16, 1992	Notice of intention to apply for rehearing
December 7, 1992	Petition for rehearing
	Order entered on January 8, 1993
July 28, 1993	Record from Court of Appeals
	Manuscript (2 vols.)
	Joint appendix (9 vols.)
	Appellants' briefs (3 vols.)
	Appellees' briefs (1 vol.)
	Reply brief of appellants (2 vols.)
	Brief of amicus curiae (1 vol.)
	Appellants' reply brief (1 vol.)
	Petition for appeal (2 vols.)

Virginia:

IN THE COURT OF APPEALS OF VIRGINIA

Record No. 1953-89-3 and 1508-90-3
through 1513-90-3

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Appellants,
against

CLINCHFIELD COAL COMPANY, *et al.*,
Appellees.

RELEVANT DOCKET ENTRIES

Date	Proceedings
December 18, 1989	Notice of appeal, with attachment (1953-89-3)
December 19, 1989	Notice of appeal, with attachment (1508-90-3)
December 19, 1989	Notice of appeal, with attachment (1509-90-3)
December 19, 1989	Notice of appeal, with attachment (1510-90-3)
December 19, 1989	Notice of appeal, with attachment (1511-90-3)
December 19, 1989	Notice of appeal, with attachment (1512-90-3)
December 19, 1989	Notice of appeal, with attachment (1513-90-3)
September 19, 1990	Appendix of cases (1 vol.)

Date	Proceedings
	Order entered on September 28, 1990 (1953-89-3 and 1508-90-3 through 1513-90-3)
	Order entered on September 28, 1990 (1953-89-3 and 1508-90-3 through 1513-90-3)
December 11, 1990	Record from trial court, 1953-89-3 and 1508-90-3 through 1513-90-3) Manuscripts (2 vols.) Transcripts (16 vols.) Exhibits (1 box) Misc. reports (2 envs.) Addendum (1 vol.)
December 26, 1990	Additional record from trial court (1953- 89-3) Manuscript (1 vol.)
January 30, 1991	Additional record from trial court Exhibits (1 vol.)
February 4, 1991	Appendix (4 vols.) Order entered on March 12, 1991 (1508- 90-3 through 1513-90-3) Order entered on December 2, 1991 (1953-89-3 and 1508-90-3 through 1513-90-3) Order entered on December 18, 1991 (1953-89-3 and 1508-90-3 through 1513-90-3)
January 2, 1992	Notice of filing of transcript, etc. (1953- 89-3 and 1508-90-3 through 1513-90-3)
January 2, 1992	Notice of appeal to Supreme Court (1953-89-3 and 1508-90-3 through 1513-90-3)

Date	Proceedings
	Order entered on January 15, 1992 (1953-89-3 and 1508-90-3 through 1513-90-3)
	Supreme Court order entered on March 6, 1992
May 26, 1989	Notice of appeal, with attachments (0790-89-3)
June 8, 1989	Amended notice of appeal (0790-89-3)
June 15, 1989	Notice of appeal, with attachments (0904-89-3)
August 15, 1989	Notice of appeal, with attachments (1287-89-3)
August 29, 1989	Notice of appeal, with attachments (1333-89-3)
October 19, 1989	Notice of appeal, with attachments (1629-89-3)
October 26, 1989	Record from trial court: (0790-89, 0904- 89, 1287-89, 1333-89) Manuscripts (6 vols.) Transcripts (18 vols.) Exhibits (7 envs.) Misc. evidence (1 group) Pickford reports (1 folder)
October 30, 1989	Record from trial court: Exhibit (1 vol.)
November 9, 1989	Notice of appeal, with attachment (1743-89-3) Order entered on November 29, 1989 Order entered on November 30, 1989
December 5, 1989	Petition for appeal (1 vol.) (0790-89, 0904-89, 1287-89, 1333-89)

Date	Proceedings
	Order entered on December 14, 1989
	Order entered on January 11, 1990
	Order entered on February 7, 1990
February 14, 1990	Record from trial court: (1629-89-3) Manuscript (1 vol.) Transcripts (5 vols.) Exhibits (1 vol.)
	Order entered on March 13, 1990
	Order entered on March 20, 1990
March 26, 1990	Additional record from trial court (1629-89): Transcripts (4 vols.) Exhibits (1 vol.) Reports (1 env.)
March 30, 1990	Record from trial court: (1743-89) Manuscript (1 vol.) Transcripts (7 vols.) Exhibits (1 env.)
April 4, 1990	Petition for appeal, etc. (1629-89-3) (1 vol.)
April 27, 1990	Appellees' statement of position in lieu of brief and motion to withdraw
	Order entered of September 21, 1990
September 26, 1990	Appellees' waiver of oral argument
	Order entered of September 29, 1990
	Order entered on December 6, 1990
	Opinion rendered March 26, 1991
	Order entered on March 26, 1991
April 24, 1991	Notice of appeal to Supreme Court

COMMONWEALTH OF VIRGINIA

IN THE CIRCUIT COURT
OF THE COUNTY OF RUSSELL

In Chancery No. 12,486

CLINCHFIELD COAL COMPANY, and
SEA "B" MINING COMPANY

vs.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*

RELEVANT DOCKET ENTRIES

Date	Proceedings
April 13, 1989	—BILL OF COMPLAINT
April 19, 1989	—NOTICE OF HEARING
April 13, 1989	—INJUNCTION—ORDER
April 13, 1989	—INJUNCTION BOND
April 13, 1989	—PROOF OF SERVICE, ON LOCAL
April 13, 1989	—PROOF OF SERVICE, DIST. 28
April 21, 1989	—MOTION TO AMEND INJUNCTION
April 21, 1989	—AMENDED INJUNCTION
April 28, 1989	—PROOF OF SERVICE—INT'L.
April 28, 1989	—PROOF OF SERVICE—DIST. 28
April 25, 1989	—NOTICE OF MOTION FOR RULE
April 25, 1989	—MOTION FOR RULE TO SHOW CAUSE
April 28, 1989	—RULE TO SHOW CAUSE—INT'L.

Date	Proceedings
April 28, 1989	—RULE TO SHOW CAUSE—INT'L.
April 28, 1989	—RULE TO SHOW CAUSE—DIST.
April 28, 1989	—RULE TO SHOW CAUSE—DIST.
May 01, 1989	—PROOFS OF SERVICE
May 09, 1989	—MOTION FOR RULE TO SHOW CAUSE
May 09, 1989	—RULE TO SHOW CAUSE—INT'L.
May 09, 1989	—RULE TO SHOW CAUSE—DIST.
May 12, 1989	—PROOFS OF SERVICE
May 10, 1989	—RESPONSE TO BILL OF COMPLAINT AND MOTION TO AMEND
May 10, 1989	—MOTION TO RECONSIDER
May 11, 1989	—MOTION FOR RULE TO SHOW CAUSE
May 11, 1989	—RULE TO SHOW CAUSE—INT'L.
May 11, 1989	—RULE TO SHOW CAUSE—DIST.
May 11, 1989	—PLAINTIFF'S PRE-HEARING MEMO- RANDUM
May 12, 1989	—PROOFS OF SERVICE
May 17, 1989	—RESPONSE TO BILL OF COMPLAINT AND MOTION TO AMEND
May 18, 1989	—ORDER ADJUDICATING DEFEND- ANTS IN CONTEMPT
May 18, 1989	—DECREE DENYING AMENDMENT OF AMENDED INJUNCTION, GRANT- ING RULE TO SHOW CAUSE WHY CERTAIN DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND DENYING INTERIM CONTEMPT SANCTIONS
May 24, 1989	—RESPONSE TO BILL OF COMPLAINT AND MOTION TO AMEND

Date	Proceedings
May 24, 1989	—NOTICE OF APPEAL
May 25, 1989	—ORDER (EXT. OF TIME TO FILE)
May 26, 1989	—FOURTH MOTION FOR RULE TO SHOW CAUSE
May 26, 1989	—RULE TO SHOW CAUSE—INT'L.
May 26, 1989	—RULE TO SHOW CAUSE—DIST.
May 31, 1989	—PROOFS OF SERVICE
June 02, 1989	—FIFTH MOTION FOR RULE TO SHOW CAUSE
June 05, 1989	—RULE TO SHOW CAUSE—INT'L.
June 05, 1989	—RULE TO SHOW CAUSE—DIST.
June 08, 1989	—PROOFS OF SERVICE
June 02, 1989	—NOTICE OF APPEAL
June 06, 1989	—NOTICE OF HEARING RE: BONDS
June 06, 1989	—MOTION TO DISSOLVE OR DISMISS INJUNCTION
June 07, 1989	—REQUEST FOR PRODUCTION OF DOC- UMENTS
June 07, 1989	—MOTION OF DEFENDANTS FOR EX- PEDITED RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS
June 07, 1989	—BILL OF PARTICULARS
June 07, 1989	—MOTION OF DEFENDANTS FOR EX- PEDITED BILL OF PARTICULARS
June 07, 1989	—SECOND ORDER ADJUDICATING DE- FENDANTS IN CONTEMPT
June 08, 1989	—PLAINTIFF'S REQUESTS FOR PRO- DUCTION OF DOCUMENTS
June 08, 1989	—PLAINTIFFS' MOTION FOR BILL OF PARTICULARS

Date	Proceedings
June 09, 1989	—BRIEF IN SUPPORT OF MOTION TO DISMISS AND DISSOLVE INJUNCTION
June 09, 1989	—RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND DISSOLVE INJUNCTION AND BRIEF IN SUPPORT THEREOF
June 12, 1989	—BOND ON APPEAL OF JUDGMENT
June 12, 1989	—MOTION TO CONTINUE PORTIONS OF FIFTH RULES TO SHOW CAUSE AND TO APPOINT A SPECIAL PROSECUTOR
June 12, 1989	—MOTION TO CONTINUE
June 12, 1989	—NOTICE OF APPEAL
June 12, 1989	—NOTICE OF REMOVAL (TO THE UNITED STATES DISTRICT COURT)
June 12-13, 1989	—EXHIBITS FILED WITH NOTICE OF REMOVAL
June 13, 1989	—ORDER OF REMOVAL
US Dist. Court	—MOTION TO REMAND AND FOR SANCTIONS, W/EXHIBITS
US Dist. Court	—NOTICE OF HEARING
US Dist. Court	—AMENDED ANSWER AND COUNTER CLAIM OF UNITED MINE WORKERS OF AMERICA AND DISTRICT 28
US Dist. Court	—RESPONSE TO UMWA TO MOTION TO REMAND
US Dist. Court	—PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO REMAND
June 22, 1989	—ORDER OF REMAND

Date	Proceedings
June 13, 1989	—MOTION TO REINSTATE SPECIFICATION 76 TO FIFTH RULES TO SHOW CAUSE
June 13, 1989	—BILL OF PARTICULARS
June 27, 1989	—NOTICE OF HEARING
June 27, 1989	—NOTICE OF HEARING
June 27, 1989	—MOTION TO STRIKE AND DEMURRER TO ANSWER AND COUNTERCLAIM
Supreme Court	—PETITION FOR RELIEF FROM INJUNCTION
Appeals Court	—BRIEF IN OPPOSITION TO PETITION
Supreme Court	—BRIEF IN OPPOSITION TO PETITION
June 29, 1989	—ORDER OF COURT OF APPEALS
June 30, 1989	—ORDER OF SUPREME COURT
June 30, 1989	—AMENDED NOTICE OF HEARING
July 03, 1989	—PLAINTIFFS' MEMORANDUM ON THE FINES FOR PRE-MAY 17 VIOLATIONS
July 6, 1989	—SIXTH MOTION FOR RULE TO SHOW CAUSE
July 6, 1989	—RULE TO SHOW CAUSE—INT'L
July 6, 1989	—RULE TO SHOW CAUSE—DIST.
July 12, 1989	—MOTION FOR A CONTINUANCE
July 12, 1989	—MEMORANDUM IN SUPPORT OF MOTION FOR CONTINUANCE OF TRIAL OF SIXTH RULE TO SHOW CAUSE
July 12, 1989	—REQUEST FOR PRODUCTION OF DOCUMENTS

Date	Proceedings
July 12, 1989	—MOTION OF DEFENDANTS FOR EXPEDITED RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS
July 12, 1989	—BILL OF PARTICULARS
July 12, 1989	—MOTION OF DEFENDANTS FOR EXPEDITED BILL OF PARTICULARS
July 12, 1989	—INTERROGATORIES TO PLAINTIFFS
July 12, 1989	—MOTION OF DEFENDANTS TO FILE AMENDED ANSWER AND ADDITIONAL DEFENSIVE PLEADINGS
July 13, 1989	—REQUEST FOR SUBPOENA DUCES TECUM
July 14, 1989	—AMENDED ANSWER AND PLEA IN EQUITY OF DEFENDANTS
July 14, 1989	—MOTION OF DEFENDANTS TO DISMISS SIXTH RULE TO SHOW CAUSE
July 14, 1989	—MOTION OF DEFENDANTS TO RECONSIDER ORDER OF JUNE 7, 1989
July 17, 1989	—DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM ON THE FINES FOR PRE-MAY 17 VIOLATIONS
July 18, 1989	—PLAINTIFFS' ANSWER TO DEFENDANTS' BILL OF PARTICULARS
July 18, 1989	—PLAINTIFFS' ANSWER TO DEFENDANTS' REQUEST FOR PRODUCTION OF DOCUMENTS
July 18, 1989	—ANSWERS TO INTERROGATORIES
July 18, 1989	—NOTICE OF FILING OF TRANSCRIPTS
July 18, 1989	—RESPONSE TO REQUEST FOR RECORDS

Date	Proceedings
July 25, 1989	—MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS SIXTH RULE
July 25, 1989	—WITH APPENDICES, A, B & C
July 25, 1989	—NOTICE OF ARGUMENT ON MOTION TO AMEND ANSWER
July 25, 1989	—NOTICE OF FILING AUTHORITIES
July 25, 1989	—NOTICE OF FILING DOCUMENTS
July 26, 1989	—PLAINTIFFS' MEMORANDUM OPPOSING DEFENDANTS' MOTION TO DISMISS SIXTH RULE
July 27, 1989	—THIRD ORDER ADJUDICATING DEFENDANTS IN CONTEMPT
August 7, 1989	—MOTION FOR MODIFICATION OF JULY 27, 1989 ORDER
August 8, 1989	—MOTION TO SET ASIDE ORDER OF JULY 27, 1989, AS BEING CONTRARY TO THE LAW AND EVIDENCE
August 8, 1989	—NOTICE OF FILING TRANSCRIPTS
August 11, 1989	—NOTICE OF APPEAL
August 11, 1989	—NOTICE OF FILING OF APPEAL BOND
August 14, 1989	—PLAINTIFFS' MOTION TO AMEND ORDER OF JULY 27, 1989
August 16, 1989	—AMENDMENTS AND SUPPLEMENTATION TO MOTION OF DEFENDANTS TO SET ASIDE ORDER OF JULY 27, 1989, AS BEING CONTRARY TO THE LAW AND EVIDENCE
August 17, 1989	—ORDER DENYING POST-TRIAL MOTIONS AND AMENDING ORDER OF JULY 27, 1989

Date	Proceedings
August 25, 1989	—NOTICE OF APPEAL
August 25, 1989	—NOTICE OF FILING APPEAL BOND
August 25, 1989	—BOND FOR COSTS
July 21, 1989	—PICKET REPORTS
	EVIDENCE ENTERED ON BEHALF OF DEFENDANTS
July 21, 1989	—SIX BOOKS “Indicating Service of Two Court Orders—
	1) Amended Injunction
	2) Second Order Adjudicating Defendants in Contempt dated June 7th, 1989
July 21, 1989	—TWO BOOKS “Indicating Service of Two Court Orders—
	1) Amended Injunction
	2) Second Order Adjudicating Defendants in Contempt dated June 7th, 1989
July 21, 1989	EXHIBIT NO. 3 LIST OF UMWA MEMBERS previously listed “Not Mailable”
July 21, 1989	EXHIBIT NO. 4 LIST OF UMWA MEMBERS Previously listed “Not Mailable”

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Date	PLEADINGS AND ORDERS
08/17/89	ORDER Denying Post-Trial Motions and Amending Order of July 27, 1989
09/20/89	ORDER Extending Injunctions
09/22/89	Writ of Fieri Facias
09/26/89	Writ of Fieri Facias
10/02/89	Writ of Fieri Facias
10/02/89	Notice to Debtor-How to Claim Exemption
10/21/89	ORDER of Removal (U.S. District Court)
10/24/89	Letter to Mr. Gilmer from Mr. Massie (Summons to Answer Interrogatories)
10/24/89	Letter to Mr. Gilmer from Mr. Massie (Subpoena Duces Tecum)
10/24/89	Affidavit Pursuant to Sec. 8.01-506.1 of the Code of VA
10/24/89	Application & Certificate Pursuant to Sec. 8.01-506 of the Code of Virginia
10/24/89	ORDER Adjudicating Discovery Motions
10/25/89	Rule to Show Cause (UMWA)
10/25/89	<i>Ninth</i> Motion for Rule to Show Cause
10/26/89	Letter to Clerk from Dominion Bank (RE: UMWA Account)
10/30/89	Motion to Set Aside <i>Fifth</i> Order Adjudicating Defendant in Contempt
11/01/89	Limited Special Appearance and Motion to Quash Debtor Interrogatories
11/01/89	Proof of Service (Notice of Lien UMWA)
11/01/89	Proof of Service (Notice of Lien UMWA)
11/06/89	Notice

Date	PLEADINGS AND ORDERS
11/06/89	Notice of Appeal <i>Fifth</i> Order
11/06/89	Notice of Filing Appeal Bond
11/06/89	Bond of Costs
11/09/89	Motion For Stay and Continuance
11/10/89	Plaintiffs' Opposition To Defendants' Motion for A Stay and Continuance
11/13/89	Plaintiffs' Opposition to Defendants' Motion for a Stay and Continuance
11/13/89	Letter from Merrill Lynch to Clerk (RE: UMWA accounts)
11/13/89	Motion of Defendants to Dismiss <i>Ninth</i> Rule to Show Cause
11/13/89	Demand for Trial by Jury
11/17/89	<i>Tenth</i> Motion for Rule to Show Cause
11/17/89	Rule to Show Cause
11/22/89	Request for a Trial by Jury
12/01/89	Request for Subpoena Duces Tecum
12/01/89	Subpoena Duces Tecum
12/01/89	Summons to Answer Interrogatories
12/07/89	Request for a Trial by Jury
12/07/89	Motion of Defendants to Dismiss <i>Tenth</i> Rule to Show Cause
12/12/89	Summons to Answer Interrogatories (Dist. 28 UMWA)
12/15/89	Proof of Service (Dist. 28 UMWA)
12/15/89	Proof of Service (Dist. 28 UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)

Date	PLEADINGS AND ORDERS
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
12/22/89	Writ of Fieri Facias (International Union, UMWA)
01/18/90	Order (Interpleaser—UMWA Relief Fund)
03/21/90	Letter to Mr. Gidmer from Mr. Shults
05/22/90	Letter to Mr. Gilmer from Mr. Triolo
05/29/90	Subpoena Duces Tecum
06/01/90	Letter to Mr. Gilmer from Mr. Triolo
08/22/90	Opinion Letter from Judge McGlothlin to Mr. Hodges, Mr. Massie, Mr. Vergara, Jr., Mr. Shults and Mr. Haviland

Date	PLEADINGS AND ORDERS
09/04/90	Notice
09/07/90	Amended Notice
09/10/90	Defendants' Renewed Motion for Recusal
09/10/90	Memorandum in Support of Motion for Order Suspending Execution of Judgment and/or Stay of Collection Pending Appeal
09/10/90	Joint Motion for Order Suspending Execution of Judgment and/or Stay Collection Pending Appeal
09/10/90	Order
09/11/90	Order
09/11/90	Order
09/11/90	Order
09/11/90	Order
09/12/90	Letter to Judge McGlothlin from Mr. Haviland
09/13/90	Certificate of Satisfaction of Judgments and Orders
09/13/90	Order
09/14/90	Order
09/18/90	Order
09/18/90	Notice of Appeal (Order 9/11/90)
09/18/90	Bond for Costs
09/18/90	Notice of Filing Appeal Bond Pursuant to Rule 5A:17
09/18/90	Notice of Appeal (Order entered 09/11/90)
09/18/90	Bond for Costs
09/18/90	Notice of Filing Appeal Bond Pursuant to Rule 5A:17

Date	PLEADINGS AND ORDERS
09/18/90	Notice of Appeal (Order 9/18/90)
09/18/90	Bond for Costs
09/18/90	Notice of Filing Appeal Bond Pursuant to Rule 5A:17
09/18/90	Notice of Appeal (8th Order)
09/18/90	Bond for Costs
09/18/90	Notice of Filing Appeal Bond Pursuant to Rule 5A:17
09/18/90	Notice of Appeal (7th Order & Order entered 09/11/90)
09/18/90	Bond for Costs
09/18/90	Notice of Filing Appeal Bond Pursuant to Rule 5A:17
09/18/90	Notice of Appeal (6th Order—Order of Sept. 11, 1990 and Order Dec. 15, 1989)
09/18/90	Bond for Costs
09/18/90	Notice of Filing Appeal Bond Pursuant to Rule 5A:17
	* * * *
10/23/89	ORDER—Concerning money paid into court from "UMWA International Relief Fund" and UMWA District 28 Sub-District Relief Fund"
11/06/89	ORDER—Motion to set aside Order of Oct. 9, 1989
11/15/89	PROOF OF MAILING OF OCT. 9, 1989, Order Entitled "Fifth Order Adjudicating Defendant in Contempt"
11/15/89	DEFENDANT'S EXHIBITS A, B, C & D—Receipts for Certified Mail
11/16/89	SIXTH ORDER ADJUDICATING DEFENDANT IN CONTEMPT

Date	PLEADINGS AND ORDERS
11/17/89	NOTICE OF FILING TRANSCRIPTS
11/22/89	NOTICE OF FILING A TRANSCRIPT
12/01/89	APPLICATION AND CERTIFICATE PURSUANT TO § 8.01-506 OF THE CODE OF VIRGINIA
12/01/89	AFFIDAVIT PURSUANT TO SECTION 8.01-506.1 OF THE CODE OF VIRGINIA
12/06/89	MOTION FOR AID AND DIRECTION
12/08/90	NOTICE OF FILING OF TRANSCRIPTS
12/12/89	NOTICE
12/12/89	NOTICE
12/14/89	NOTICE OF APPEAL of SIXTH ORDER ADJUDICATING DEFENDANT IN CONTEMPT
12/14/89	NOTICE OF FILING APPEAL BOND
12/14/89	BOND FOR COSTS
12/15/89	SEVENTH ORDER ADJUDICATING DEFENDANT IN CONTEMPT
12/15/89	ORDER LIQUIDATING FINES UNDER SIXTH CONTEMPT ORDER
12/15/89	EIGHTH ORDER ADJUDICATING DEFENDANT IN CONTEMPT
12/20/89	NOTICE
12/20/89	NOTICE
12/21/89	OPPOSITION TO PROPOSED ORDER CONCERNING COMPENSATION OF "SPECIAL COMMISSIONERS"
12/21/89	ORDER—Vacation of Fines
12/28/89	OBJECTION TO SECOND STATEMENT OF THE SPECIAL COMMISSIONERS

Date	PLEADINGS AND ORDERS
01/05/90	MOTION TO SET ASIDE ORDER OR DEC. 15, 1989 AS BEING CONTRARY TO THE LAW AND EVIDENCE
01/05/90	MOTION TO POSTPONE HEARING
01/16/90	NOTICE OF APPEAL—ORDER LIQUIDATING FINES UNDER THE SIXTH CONTEMPT ORDER
01/16/90	NOTICE OF APPEAL—EIGHT ORDER ADJUDICATING DEFENDANT IN CONTEMPT
01/16/90	NOTICE OF APPEAL—SEVENTH ORDER ADJUDICATING DEFENDANT IN CONTEMPT
01/16/90	BOND FOR COSTS
01/16/90	BOND FOR COSTS
01/16/90	BOND FOR COSTS
01/16/90	NOTICE OF FILING APPEAL BOND
01/16/90	NOTICE OF FILING APPEAL BOND
01/16/90	NOTICE OF FILING APPEAL BOND
02/22/90	ORDER
03/14/90	ORDER
03/14/90	ORDER
	* * * *
08/22/89	—Motion to Set Aside Finding of Contempt and to Consider the Lawfulness of Two Picket Locations
08/29/89	—7th Motion for Rule to Show Cause
08/31/89	—Rule to Show Cause
08/31/89	—Motion of Defendants for Court Approval of Form to be Used as Acknowledgment of Proof of Service, Court Orders
09/05/89	—Motion to Supplement 7th Rule

Date	PLEADINGS AND ORDERS
09/05/89	Interrogatories & Production Request
09/05/89	Motion for Continuance
09/06/89	Designation of Specifications for Trial, Sept. 13 & 14, 1989
09/06/89	Affidavit
09/06/89	Affidavit
09/09/89	Motion to Establish Picket Locations & Expand Number of Pickets at Existing Sites
09/08/89	Motion to Quash Subpoenas
09/08/89	Letter to Judge McGlothlin from Mr. Kindig
09/09/89	Motion for Expedited Discovery
09/09/89	Motion to Dismiss or, Alternatively, Motion for a Bill of Particulars
09/11/89	Letter to Judge McGlothlin from Mr. Haviland and Mr. Shults
09/11/89	Answer to Defendant Interrogatories and Production Request
09/11/89	Designation for Specifics for Trial Sept. 18 & 19, 1989
09/12/89	Motion to Quash Subpoena Served on John J. Banovic
09/12/89	Defendants' Response to Discovery
09/12/89	Motion of Defendants to Dismiss 7th Rule to Show Cause
09/12/89	Bill of Particulars
09/14/89	Motion to Extend Injunctions
09/18/89	Affidavit of John J. Banovic
09/18/89	Defendants' Motion to Dissolve or Modify Injunction

Date	PLEADINGS AND ORDERS
09/18/89	Memorandum in Support of Motion to Dissolve or Modify Injunction
09/21/89	4th Order Adjudicating Defendants in Contempt
09/22/89	Notice of Filing Transcript
09/27/89	Motion to be notified of Court Proceedings
09/28/89	Motion to Shorten Time for Defendants' Discovery Response
09/28/89	8th Motion for Rule to Show Cause
09/28/89	Rule to Show Cause
09/28/89	Affidavit
09/28/89	Motion for Rule to Show Cause International Officers & Executive Board Members
09/28/89	Rule to Show Cause Officers & Executive Board Members
10/02/89	Notice
10/02/89	Motion to Set Aside Order of July 27, 1989
10/02/89	Motion to Vacate Portions of April 21, 1989 Injunction
10/02/89	Supreme Court Order
10/04/89	Motion for Recusal
10/04/89	Motion for Injunction
10/04/89	Motion to Quash Execution
10/06/89	Supreme Court Order upon a Petition for Writ Prohibition
10/09/89	Memorandum in Support of Appointment of Special Commissioners
10/09/89	5th Order Adjudicating Defendants in Contempt
10/19/89	Reply Memorandum
10/11/89	Order

Date	PLEADINGS AND ORDERS
10/11/89—Order	
10/11/89—Order	
10/11/89—Order	
10/11/89—Notice of Hearing	
10/11/89—Notice	
10/13/89—Notice of Appeal 4th Order Adjudicating Defendant in Contempt & Order denying Defendants' Motion to Set Aside Order (9-21-89) Entered October 11, 1989	
10/13/89—Notice of Filing Appeal Bond	
10/13/89—Bond for Cost	
10/13/89—Notice of Taking Depositions	
10/16/89—Motion to Quash Notice of Hearing or Alternatively, for Protective Order	
10/16/89—Response to Request for Production of Documents	
10/16/89—Answer to Interrogatories	
10/16/89—Response to 2nd Request for Admissions	
10/16/89—Motion to Quash Deposition, Notice & Subpoena Duces Tecum & Motion for Protective Order	
10/16/89—Motion to Have Matters Taken as Admitted & Motion to Compel Discovery	
10/16/89—Notice	
10/16/89—Request for Subpoena Duces Tecum	
10/17/89—Motion for Modification of Portions of Injunction Pertaining to Service by Attorneys	
10/19/89—Request for Subpoena Duces Tecum	
10/20/89—1st Report of Special Commissioners	
10/20/89—Notice of Removal	

Date	PLEADINGS AND ORDERS
10/20/89—Proof of Mailing of Sept. 21, 1989 Order Entitled "Fourth Order Adjudicating Defendant"	
10/23/89—Motion of Defendants to Dismiss 8th Rule to Show Cause	
10/23/89—Memorandum in Support of Demand for Trial by Jury	
10/23/89—Demand for Trial by Jury	
10/23/89—Motion for Recusal	
10/23/89—U. S. District Court Order Remanding back to Russell Co	
10/23/89—Motion for Postponement	
10/25/89—9th Motion for Rule to Show Cause	
10/30/89—Motion to Set Aside 5th Order Adjudicating Defendants in Contempt as Being Contrary to the Law and Evidence	
10/30/89—2nd Report Special Comrs	

CIRCUIT COURT OF RUSSELL COUNTY

Case No. (Chancery) 12486

CLINCFIELD COAL Co., *et al.*

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AM., *et al.*

August 22, 1990

By JUDGE DONALD A. MCGLOTHLIN, JR.

This matter is before the Court upon the defendant's motion to set aside the December 15, 1989, orders previously entered by this Court, upon the parties' joint motion for "Order Re Dismissal" and upon the several representations of counsel and memoranda filed in support of the parties' positions herein. The Court should note also that two memoranda have been filed by the Center on National Labor Policy, Inc., as *amicus curiae*, in opposition to the plaintiffs' and defendants' joint motion.

On December 15, 1989, this Court entered three orders, one liquidating prospective fines under its sixth contempt order, and two others adjudicating the defendant in contempt and liquidating portions of the prospective fines which had been previously announced on May 16 and June 2, 1989. On January 5, 1990, at 11:30 a.m., the defendants filed a motion to set aside these three orders as being contrary to the law and the evidence along with a motion to postpone the hearing on the motion to set aside. At this time the parties announced a tentative settlement of the strike "underlying this action." The Court entered its order that day temporarily suspending the three

orders of December 15, in order to provide the defendant more time to fully present its arguments and the Court more time to consider the motion to set aside and any other motions the parties might file thereafter.

After having considered the argument of counsel and the authorities submitted, it is the opinion of this Court that the defendants' motion to set aside the orders entered December 15, 1989, must be denied.

The evidence presented by the plaintiffs as to each of the allegations of contemptuous behavior proves without question that the International U.M.W.A. was the author of these actions. The fact that some of the evidence as to the defendants' complicity was circumstantial makes it no less competent or convincing.

Nor can the defendants' protestations that these proceedings were criminal contempt hearings change the fact that they were civil in nature. The Court early on announced its purpose in imposing prospective civil fines, the payment of which would only be required if it were shown the defendants disobeyed the Court's orders. That purpose was to compel compliance with the Court's orders which were entered to protect the rights of the plaintiffs and the public. The fines were conditional, and it was within the defendants' sole power to avoid payment of the fines.

The Supreme Court of the United States in *United States v. United Mine Workers of America*, 330 U.S. 258, 304-305, 67 S. Ct. 677, 701 (1947), has specifically sanctioned the imposition of monetary fines payable to the Court to compel a recalcitrant defendant (the same defendant as in this case) to discontinue a strike it had called. The United States Court of Appeals for the Second Circuit has likewise found that the imposition of fines "*in terrorem*" is authorized as a means of securing future compliance with a decree. *Sunbeam Corp. v. Golden Rule Appliance Co., Inc.*, 252 F.2d 467 (2d Cir. 1958). In that case the defendant was ordered to

pay a competitor a \$2,500.00 fine for every future sale of the competitor's product in violation of a consent decree. The fine there, as here, was imposed only conditionally and depended upon the contemnor's future conduct. The contempt sanctions imposed by this Court were civil in nature, not criminal. Thus, defendant had no right to trial by a jury or to a public prosecutor.

Defendants complained of the Court's appointment of counsel for plaintiff as Special Commissioners to collect the fines imposed. This issue is now moot as Messrs. Hodges and Massie have been relieved of those duties.

The remaining grounds assigned by defendants in its motion to set aside are without merit, and the Court overrules the motion. The Court would comment, though, that the interpretation of the evidence with regard to the existence of "roving pickets" and the understanding of the bases of the Court's findings argued by defendants' counsel belie their intelligence and are tributes to their inventiveness. This Court in its earlier orders specified the sites where picketing would be authorized along with the number of pickets allowed at each site. The evidence presented at all of the hearings showed a constant patterns of pickets locating themselves at various unauthorized places from which they would move to another picket site when police or others attempted to investigate incidents. The evidence of moving or roving picketing was overwhelming.

The parties filed a joint motion for "Order Re Dismissal" on January 24, 1990, when they again represented to the Court that they had come upon a tentative settlement of the strike and asked the Court to rule immediately on this motion even though the proposed agreement had to be submitted to the U.M.W.A. members for a ratification vote, something which had not even been scheduled at that time. The Court conducted two hearings during which it was shown a written agreement entered into by the parties purportedly resolving the many

cases in litigation spawned by the strike. At the parties' request, the Court viewed *in camera* a supplemental agreement between them containing portions of their pact which the International Union desired not be made public. Certain "submissions" were made by the defendant in which it proposed to have its membership perform community service work in order to purge itself of contempt. On February 12, 1990, the Court rules from the bench that it would not, upon the evidence, the representations and the argument presented to that date, vacate its orders imposing the civil fines merely because the parties agreed it should do so. Thereafter, an additional "submission" was filed by the defendant, increasing the number of hours of community service proposed, together with several additional memoranda by Clinchfield, the U.M.W.A. and the Center on National Labor Policy, Inc. (as *amicus curiae*). Subsequently, there was also proposed to the Court a hearing at which the top leadership and management of the parties would appear to discuss various issues with the Court. The Court was, of course, available for such a hearing, but none was ever scheduled even though several weeks passed after the proposal was made. It appearing that nothing further will be forthcoming on these issues, the Court considers them ripe for adjudication.

The parties have requested dismissal of this lawsuit and dissolution of the injunctions entered. There is no question that upon reaching a settlement of their dispute, these litigants are entitled to have such requests granted. The Court will, therefore, enter an order dismissing plaintiffs' Bill of Complaint for injunctive relief and dissolving all injunctions insofar as they grant relief to the plaintiffs.

The parties have also requested vacation of all orders imposing fines for contempt, including not only those entered December 15, 1989, but also judgments entered more than twenty-one days prior to the filing of the motion. Virginia Supreme Court Rule 1:1 provides that "All final judgments, orders and decrees . . . shall remain

under the control of the trial court for twenty-one days after the dates of entry, *and no longer.*" (Emphasis supplied.) Defendants have noted appeals of the orders entered before December 15, 1989, and they are now before the Court of Appeals of Virginia. Having taken the position that these orders are final and therefore ripe for appeal (a position with which this Court agrees), the defendants cannot now argue to the contrary. These orders are beyond the reach of this Court and shall remain undisturbed.

Turning to the December 15 orders now, the Court is told that because this is a civil suit, the litigants are entitled, upon announcing a settlement of their disputes, to have the contempt proceedings dismissed and all fines previously liquidated vacated. The Court is cognizant of the principles of law upon which the argument is founded but disagrees with the contention that they require in this case the action requested of the Court.

The underlying action upon which these civil contempt proceedings are dependent is, of course, plaintiffs' suit for injunctive relief, the purpose of which was to obtain the preventative power of a court of equity (1) to protect the company from the power of a large labor union unlawfully used against it, and (2) to protect its employees, servants, contractors, their families and members of the general public from defendants' unlawful acts. Clinchfield sought government intervention to prevent the obstruction of private and public rights of ways; the intimidation and coercion of any person's entering or leaving plaintiffs' worksites; the threatening and assaulting of persons; the throwing of rocks and other missiles at vehicles or persons; the placing of devices designed to puncture tires of automotive traffic on private and public roads; the obstruction of the vision of those operating motor vehicles; the following or trailing of company employees and their families, and so on. The Court granted much of the relief requested finding defendants were interfering

with the rights of the plaintiffs *and* those of the general public.

Moreover, with the passage of time, defendants' strategy for conducting the strike shifted from acts affecting primarily the company to acts affecting both those members of the public associated with the company and those who had no connection with any of the litigants. The focus and loci of defendants' unlawful conduct shifted from company property and facilities to the public highways and private homes and businesses. So, as the strike proceeded, the protection sought from and granted by the Court was more and more for the general public. Concomitant action by the executive branch of this Commonwealth's government brought scores of Virginia State Police officers, Department of Transportation workers, etc., and millions of dollars' worth of equipment to the task of protecting the rights of not only the litigants, but the general public as well. Thus, when the Court found it necessary to liquidate the prospective fines imposed, and when defendant strenuously objected to awarding them to Clinchfield, the bulk of the fines were made payable to the Commonwealth and the two counties most heavily affected by the unlawful activity. From its institution, and more and more as it proceeded, this case has involved the protection of the rights of the general public in addition to those of the plaintiffs. In *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418 (1911), the United States Supreme Court employed an analysis of the purpose of a suit and the relief awarded in determining whether litigants are entitled to a dismissal of contempt proceedings. Although in that case, the Court rules in favor of the requested dismissal, analysis of the purpose of this suit and that the nature of the relief awarded shows there are substantial differences in the facts there and here, differences so significant as to compel an opposite result.

Additionally, the motion for "Order Re Dismissal" was not made until January 24, 1990, nineteen days after the

Court agreed to suspend the operation of its December 15, 1990, orders concerning contempt. Even at that time, their request was not to dismiss the cause, but to enter an order stating the Court's *intention* to dismiss it upon the ratification of the then tentative labor contract and cessation of the strike. The Court's rulings finding the defendant guilty of several counts of contempt, liquidating numerous fines and apportioning them among the plaintiff, Dickenson and Russell Counties and the Commonwealth were announced from the bench December 8, 1989, and reduced to written form by the orders entered December 15, 1989. The effects of these rulings were suspended by order entered January 5, 1990, to allow the Court time to consider defendants' motion to set aside. The request for vacation of the contempt fines came too late.

What is more, the parties announced only *tentative settlement* of their dispute. Even the language of the proposed order was conditional, only to be given effect should the proposed labor contract be ratified by the U.M.W.A. membership. Defendants even argued that the Court's entry of the proposed order was a condition prerequisite to the submission of the contract proposal to its membership. Although the Court is aware that the proposal was indeed ratified by the unions' membership in February, 1990, and the Court assumes that the strike and picketing against plaintiffs has indeed ceased, the Court feels strongly that the parties attempted by these motions to set aside and to dismiss and vacate to manipulate the Court's decision making process and the orderly disposition of these matters. Basically, the parties attempted to extort the desired ruling from the Court by making it appear final settlement of this bitter, violent labor dispute was contingent upon that favorable ruling. The parties did not act in good faith.

Although the law favors the resolution of disputes by compromise and settlement rather than by litigation, *Bangod Punta Operations, Inc. v. Atlantic Leasing Ltd.*,

215 Va. 180, 207 S.E.2d 858 (1974), the reason for this rule is instructive. Settlement is less expensive and less time consuming. It saves time, effort and expense of the parties, the attorneys and the courts. Compromise and settlement is said to be conducive to more amicable relations between the parties. 15 Am. Jur. 2d *Compromise and Settlement*, § 6. Here, no time can be saved nor expense avoided. The parties' time, effort and money have already been expended; nor will the attorneys' or Court's time be saved—it has already been consumed; nor will future relations of the parties be affected when both parties have joined in the motion to dismiss/vacate and done their utmost to obtain a favorable ruling.

Here, the parties rested their cases, submitted the issues to the Court, and the Court rules and entered its orders. In effect, the original parties came upon a settlement of their differences after judgment. Had the rulings been such that Clinchfield was the sole beneficiary of the judgments of the Court, it would be simple enough for the parties to effect their object. The judgments, however, made the Commonwealth and two of its political subdivisions recipients of portions of the liquidated fines. Due to the nature of defendants' unlawful conduct, the nature of the relief requested by Clinchfield, and the protection the Court granted, the public, the citizens of this Commonwealth, were necessarily intimately affected and were the intended beneficiaries of the suit and the relief granted. There is a decisive difference between such a case and one involving only the litigants or one in which the Court-ordered protection is focused solely on the litigants. The Supreme Court of the United States has recognized that the payment of fines to the Court is proper remedial relief when payment can be avoided by compliance with the Court's order. *Hicks v. Feioks*, 485 U.S. 624, 99 L. Ed. 2d 721 (1988). Certainly the same is true of fines the Court makes payable to other branches of the government. Where, as here, the public's welfare is so intimately involved and the Court has granted civil con-

tempt relief payable in effect to the public, and where judgment has been announced and entered, the public's interest must be considered. There can be no "settlement" without the consent of at least all those whom the relief granted is intended to benefit. No such consent is present in this case. Neither the Commonwealth, nor the two counties, nor the Court has agreed to the vacation of these fines.

The Court must also take into consideration the fact that the defendants have made no meaningful effort to purge their contempt. The offer to have its member perform a paltry 10,000 or even 20,000 hours of community service to atone for the repeated, massive, violent violations of this Court's orders is an affront to our system of law and to the Court. Likewise, if ever a party has come to the bar seeking equity with unclean hands, the defendants in the case have. Not only have they violated the injunctions put down to protect the plaintiffs and the public, but they have refused to abide by the Court's judgments, e.g. directing payment of fines and service of the orders upon its membership. The International, U.M.W.A. remains defiant and deserves no relief.

This Court's judgments will be given effect to the extent that consent to vacate them is lacking. As the plaintiffs have indicated their consent, and since they can easily have any judgment in their favor marked "satisfied" by the Clerk, so much of the fines as were directed payable to Clinchfield shall be vacated. The remainder shall be paid by the defendants with interest from December 15, 1989. The suspension of those portions of all orders adjudicating contempt, liquidating fines against the defendants, and directing the method and time of payment of the fines shall be terminated and they shall remain intact and in effect. All fines liquidated by the orders entered December 15, 1989, shall be payable to the recipients through the Clerk of this Court no later than ten days after the entry of the order commemorating the rulings herein.

The Court will appoint John L. Bagwell, Esq., of Grundy, Virginia, to act in the place and stead of the Commonwealth's Attorneys of Russell and Dickenson Counties, who have both asked to be disqualified in all these cases, and to act as Special Commissioner in Chancery for the purpose of collecting any unpaid fines due and payable to those political subdivisions and the Commonwealth at a fee to be approved by the Court. The Court shall further direct Mr. Bagwell to take all actions necessary to immediately begin collection of any fines remaining unpaid after the date specified above and to report to the Court his efforts and the results of those efforts at collection.

In its comments from the bench in response to the motions disposed of by the rulings in this opinion, the Court expressed its concern over the need to establish and protect the rule of law and the authority and power of courts to enforce the law. The conduct of the defendants throughout the history of this litigation has certainly given rise to grave concerns over whether they will be governed by the law and the institutions created by to administer the law, or whether they will be permitted to operate outside the rules society establishes for the conduct of affairs amongst its members. Because the judgments heretofore entered are civil in nature and because the contempt proceedings previously had were for the purpose of persuading the defendants to stop violating the rights of plaintiffs and the citizens of these communities and because there is evidence before the Court that the defendants have violated several of this Court's orders and because it is imperative that if the defendants have knowingly violated these orders, they must be made to realize the consequences thereof, the Court is of the opinion that criminal contempt proceedings must be instituted to determine whether the defendants or its members have been guilty of knowingly violating these orders.

[1]

VIRGINIA:

IN THE CIRCUIT COURT
OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

vs:

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants

TRANSCRIPT OF HEARING

February 12, 1990

APPEARANCES:

KARL K. KINDIG, ESQ.
Lebanon, Virginia

STEPHEN M. HODGES, ESQ.

WADE W. MASSIE, ESQ.
Abingdon, Virginia

Counsel for Plaintiffs

ROBERT E. STROPP, JR., ESQ.
Washington, D.C.

JAMES J. VERGARA, JR., ESQ.
Hopewell, Virginia

Counsel for Defendants

[2] The within styled cause came on to be heard on this 12th day of February, 1990 before the HONORABLE DONALD A. McGLOTHLIN, JR. Judge of the Russell County Circuit Court, and the following proceedings were had, to-wit:

THE COURT: This is in the matter of Clinchfield Coal Company versus the International UMWA on a Motion that was filed jointly by the parties for the Court to dismiss the proceedings in this case and all Orders concerning fines. First, I should ask if the Plaintiffs have any evidence or any argument that they want to make in the matter. And I will defer to the Counsel.

MR. KINDIG: Your Honor, we have no evidence present in this matter. We do support the Joint Motion. We certainly don't wish to trivialise the involvement of the community, but in the end we view it as primarily a matter of private litigation between us and the Union. And we have achieved a comprehensive resolution of our labor dispute and believe that the Order that we have jointly asked for will help us bring an end to this labor dispute in the fashion that will lead to—in a fashion that will lead to [3] labor peace in this area and be ultimately in the public interest.

THE COURT: Thank you, Mr. Kindig. Does Counsel for the Defendants care to make a statement or do you have additional information that you would like the Court to consider?

MR. VERGARA: Your Honor, with the Court's permission, first I would, according to the Rules of the Supreme Court, ask the Court to allow Mr. Robert Stropp, General Counsel of United Mine Workers, to argue the Motion.

THE COURT: Is there any objection?

MR. KINDIG: No.

THE COURT: The Court is familiar with Mr. Stropp's qualifications and I welcome you before the Bar. And yes, you may present argument.

MR. STROPP: Thank you, Your Honor. May it please the Court, before the Court is the Joint Motion that was referred to by Mr. Kindig. The parties have reached a comprehensive settlement. And as a part of that settlement to resolve not only the Collective Bargaining Agreement, but it is to resolve all issues between the parties. The Joint Motion, and attached to the Joint Motion we have an agreed [4] Joint Order that we submit for Your Honor's consideration to dismiss the lawsuit and to set aside the fines.

Very briefly at this point, the grounds as set forth in the jointly proposed Order are that the fines that the Court has thus far imposed have always been characterized as coercive civil contempt fines. We submit, Your Honor, as a matter of law, the underlying purpose is to ensure or coerce compliance with the Court's Orders, and that those Orders are directed to certain picket line and strike activity and that upon cessation of the strike ratification by the Union's membership of those purposes, as a matter of law, will no longer be present. And thus, it would be appropriate to, as a matter of law, to set aside the fines.

Secondly, we agree with Mr. Kindig that this lawsuit has been a lawsuit between private parties. And while we do have certain matters on appeal, contending that the fines imposed were criminal contempt fines, the case has proceeded consistently along the lines as a private lawsuit, and that the parties to the [5] lawsuit have agreed to a dismissal and should be accorded the same rights as other parties in private litigation.

And finally, and again very briefly, we think, Your Honor, that it certainly is within the best interests of not just the parties to this lawsuit, but to the members of the community at large and the members of the Union and the employees of Pittston, the State and Counties involved. And we can go as far as to say the Federal Government, with respect to its participation in this litigation; that it is in the best interest of all those concerned that the healing process commence as soon as possible and

hopefully that would be upon ratification of the parties' Collective Bargaining Agreement by the membership of the Union.

Your Honor, if I could just to—if I could digress a minute just to explain to the Court the part we have done in chambers about the settlement that the parties agree. The settlement approach, at least from the standpoint of the UMWA, was very complex in one respect. We recognized, and I believe [6] Pittston did as well, that the issues and particularly the health care issues, were very complicated issues. We had attempted for quite some time and then with the assistance of Judge Glen Williams, as a mediator, to meet and reach an agreement, a Collective Bargaining Agreement, and we were not successful there. The Secretary of Labor, Elizabeth Dole, became quite concerned about the progress of this strike and the community involved and assigned a mediator, William Usury, who was a former Secretary of Labor. And at Mr. Usury's urging, I believe both Pittston and UMWA committed themselves to devote all energies and resources to settle with each other their—we recognized that there were many other participants and some more directly affected than others, involved in this labor dispute. The communities at large had, the State and the Counties involved, they were all affected. Nationally, we suggest that there has been some impact. This Court has certainly been impacted by this strike. The Federal Court, with Judge Williams, and various Courts in the State of [7] West Virginia—and States of West Virginia and Kentucky. We had very complex collective bargaining issues on the one hand. But arising out of the strike, we had almost equally as complex lawsuits. We believed in the beginning that it would not, we could not merely resolve our collective bargaining issues and commence a relationship but still have lingering all the litigation that we had initiated, both Pittston and United Mine Workers of America; that we commenced negotiations with the premise that if we had a future relationship, we would

have to resolve all the litigation. We could not have participating negotiations, as I am sure Your Honor might appreciate. We couldn't have the National Labor Relations Board sitting in the negotiations and all the various Courts, including Your Honor, in an attempt to resolve the litigation aspect. We had listed for Your Honor, and we showed Your Honor, I believe, the litigation settlement that we had reached, that specified the numbers of cases that we have the pleadings, ranging from a very complex litigation that the Union had [8] initiated in the United States District Court for the District of Connecticut. The Union also was involved in certain proxy litigation in the District Court in the District of Columbia. Pittston had its litigation against the United Mine Workers here in Virginia, in the State and Federal Courts. And I believe in three or four Counties, as well as we had litigation in West Virginia, in both Federal and State Courts. And not the least was the numbers of charges, maybe numbering fifty or so, with the National Labor Relations Board, the agency charged with the expertise of having the expertise to oversee labor relations on a National basis. At the commencement of the strike—and I again apologize for digressing a bit—at the commencement of the strike, the National Labor Relations Board, based upon unfair labor practice charges that the Union had filed, concluded that the strike was an unfair labor practice strike. I mention this only because we showed Your Honor in chambers all those charges that the NLRB considered, many of which involved the commencement of this [9] strike. We began negotiations and actually went right up until Christmas Eve. The negotiators were under very intense pressure. I believe there was a break of one day over Christmas and maybe half a day on Christmas Eve. And then went right back and negotiated through New Year's until approximately 11:30 on New Year's Eve. With the Secretary of Labor, Elizabeth Dole, we finally reached an agreement. I know there was probably, the press of Counsel was wide spread. I think the national

news covered the press conference in Washington the next day announcing that the parties had reached a settlement that involved, not just again the collective bargaining issues, but all the litigation between the parties. Nevertheless, it still took some 24 days after New Year's to iron out the language over the various collective bargaining items and including the litigation settlement. Again on New Year's Eve, Your Honor, we would have extended an invitation to you to appear or to others or other Judges, the NLRB, but this kind of settlement, Your Honor, in all seriousness, I believe could [10] have been reached if we would, if the parties would have been put in a position to negotiate each piece of litigation on a piecemeal basis. We simply believe, in terms of our approach, that that would not have worked. The settlement that we reached and as we have stated to Your Honor is a very fragile one and one that had conditions that must be, required to be met before we, the Union, would proceed to ratification with the membership vote. We met with Your Honor a couple of weeks ago to discuss the instant Motion and agreed upon a proposed Order before the Court today. And Your Honor raised a couple of concerns with respect to this instant Motion. First, there was concern about certain future assurances that the Union might give in order to, in order to hopefully not have the kinds of activities that Your Honor heard, occur in the future. While we have those matters on appeal, nonetheless, we have, I believe, proceeded to recognize Your Honor's concern and would like to introduce for Your Honor's consideration a copy of the agreement we have reached with the National Labor Relations [11] Board that disposed of all the charges before that agency. And I believe you have got a copy. If I could make that part of the record, Your Honor.

THE COURT: This is entitled "Agreement" and dated February 9, 1990, is that correct? Four pages, plus an addendum?

MR. STROPP: Yes sir.

THE COURT: Signed by yourself and Jerry Hunter, General Counsel of the National Labor Relations Board and William Hoffman for the Plaintiffs?

MR. STROPP: Yes sir.

THE COURT: All right, I have that and that will be made a part of the record as an Exhibit, called Defendants' Exhibit 1. There was also an appendage that the Court received entitled, "Court Order."

MR. STROP: Yes sir.

THE COURT: Do you wish that to be made a part of that agreement?

MR. STROPP: Yes sir, Your Honor, we would.

THE COURT: All right then, that would be Defendants' Exhibit 2.

MR. STROPP: Very briefly, Your Honor, the NLRB [12] Agreement 1, incorporating the Court Order of the Fourth Circuit extends to the State of Virginia the purgation provisions contained in that Court Order, which are designed to require the International and its membership, upon the commencement of a strike, to go through certain notice and training obligations to those members who commence picketing and engaging in a strike. There is, again there is, I believe, a training film referred to with respect to peaceful and non-violent picketing. The Order further regulates the activity to be engaged upon on the picket line and calls for contempt sanctions to be imposed on violation of—any violation of that Court Order. Specially addressing Your Honor's concerns about future assurances, I believe you would find that there are prospective fines included in the Fourth Circuit Court Order. I would say this, though, Your Honor, the agreement we reached with the National Labor Relations Board, Exhibits 1 and 2, that was strictly voluntary on the part of United Mine Workers of America. We do not believe that given the current [13] status of the cases before the Court, that we otherwise would have been required to enter into that type of settlement. And we did so, however, specifically designed to present to Your Honor, your

needs, as well as the needs of other Judges with respect to the future and the future conduct over picketing and strike activity. I would too, if I could, show Your Honor and introduce as Exhibit 3, a copy of a press release.

THE COURT: Any objections?

MR. KINDIG: No.

THE COURT: This will be marked Exhibit 3 for the Defendants.

MR. STROPP: A press release by the General Counsel of the National Labor Relations Board, again the agency charged with administering the National Labor Relations Act which governs picketing and strike activity. The General Counsel, in speaking of our settlement which was reached this past Friday, is quoted in the press release as saying, and I quote, "Expansion of the Circuit Court's decree covering future violations of the National Labor Relations Act and prescribing procedures for future strike [14] activity in Virginia fully remedies the alleged violations and will permit the parties to resume their collective bargaining relationship in an environment free of litigation." Those alleged violations, Your Honor, were all—and you may have heard this argument before—they were duplicative of the claims raised in this lawsuit and the conduct which became the subject of this lawsuit here, as well as in Federal Court with Judge Williams. The General Counsel went on to say, and I will quote again, Your Honor, "In view of the scope and comprehensive nature-of the consent decree, the public interest is well served by this settlement." We submit Exhibit 3 for Your Honor's consideration as well.

Again, Judge, we would respectfully point out that the commencement of this strike was determined to be an unfair labor practice strike, based upon the charge brought by the Union against Pittston. We have for Your Honor's consideration and as a part of, in support of this Motion and as a part of an over-all settlement and resolution, the claims [15] in this case, a public statement which I would pose for Your Honor's consideration. I could read it into

the record, if you wish, or hand it over to Your Honor, whatever you would prefer.

THE COURT: It may be well to go ahead and read it.

MR. STROPP: This statement is similar to a statement that was read by Judge Williams many months ago—read to Judge Williams many months ago, accepted by Judge Williams on behalf of Marty Hudson and Jackie Stump, who purged themselves of contempt and were then released from Federal custody. And I am authorized to read this statement, Your Honor, that they—part of the settlement and in support of the Motion to Dismiss, (Reading), "The members of the Union work and live in this community. Most, if not all, have no criminal records. And many have served their country in the military of the United States. They respect this Court and the laws of Virginia and the United States. That we also recognize and understand the authority of this Court, the Union adopts and likewise re-asserts those principles in terms of respect for this Court. [16] This strike has been a difficult time for them, the Union, Pittston and this entire area. While your decisions are thus far not final and are under appeal, members of the Union and the Union realize that this Court has found them guilty of contempt for certain purported conduct. At no time was their conduct intended to show disrespect for this Court or the law. Rather, their actions were an effort to support their belief and their cause. They hope and sincerely request that this Court will join them, Pittston and other Courts, the NLRB and this area in putting this matter behind them in setting aside the fines and dismissing this action, so they will continue to support the UMWA and its members in struggles that are just. It was not their intention, the Union or its members, in the past, nor will it be in the future to intentionally show disregard or disrespect for the Court and the law. And neither will they ask others to do so." That was adopted by the statement read to and accepted by Judge Williams.

In addition, Your Honor, we believe that [17] —we would suggest for your consideration that we would undertake to—in an effort to repair some of communities from the strike—and I say strikes are bad for all, the Union, for the company, all involved. Nevertheless, the Union is prepared to organize a devotion of some 10,000 hours of community service to commence upon the ratification of the Collective Bargaining Agreement and a return to work of the strikers. These community service projects would be directed to the following: Identification of special groups of individuals in need, such as the elderly and handicapped. Persistence with home repair. Support for the development of recreational facilities, such as youth centers for teenagers and children. And any other similar worthwhile projects which might be suggested in consultation with community leaders for Russell and Dickenson Counties. And further, we would propose to work with those community leaders in an effort to carry out these commitments in the most efficient and meaningful manner.

Secondly, and in recognition that the [18] strike benefits available to striking members, which also include health benefits, would ordinarily terminate at the cessation of the strike, upon ratification of the strike and return to work of those working members, there may be some who would not immediately return to work and therefore, those individuals would ordinarily be on a lay off status. Upon cessation of the strike, we would propose that those individuals continue to receive for this 10,000 hours, 30 day period, the strike benefits that would come as if the strike would not have terminated, along with health insurance. The 30 days, Your Honor, is consistent with the 30 day commitment to perform the 10,000 hours. This proposal would allow for, at least an initial transition of those individuals and so that they might make an adjustment for the future.

Secondly, we believe that this might alleviate some of the burden on the Counties, in terms of the support systems that might be available to those individuals, if they

were immediately cut off of selective strike benefits.

[19] We would further challenge Pittston to join in with us to match this effort to restoring the communities.

Your Honor, we have finally, in support of the Motion, we would refer Your Honor to letters that have been written to the Court. Letters from the Chairman of the Russell County Board of Supervisors, and likewise, from the Dickenson County Board of Supervisors. Letters written to Your Honor, suggesting that those, any interests that they might have in terms of the fines being paid, payees to the fines, that they would disclaim such interest and that they do not want that kind of interest to be a stumbling block to proceeding to an over-all settlement and a dismissal of the fines.

Similarly, we have— would refer Your Honor to a letter written quite some time ago, in June of 1989. I say to Your Honor it was a letter written by Counsel for Pittston to the Attorney General, again a letter dated June 15, 1989, in which the company requests, requested that the State intervene in this proceeding in order to protect its interest. [20] My understanding from Counsel is that there was an acknowledgment that that letter was received and yet there has been no appearance of the State in this case.

Your Honor, your secretary handed over to us just as we were coming into Court, a letter written to Your Honor dated today. And if I could just read this letter into the record, I would appreciate it.

THE COURT: Any objection to that?

MR. HODGES: No sir.

MR. STROPP: (Reading) "Dear Judge McGlothlin: As the special mediator appointed by the United States Secretary of Labor, Elizabeth Dole, to the UMWA-Pittston dispute, I am writing to offer by insights into the pending collective bargaining settlement, in the hopes that they might assist you in evaluating the current situation. The UMWA-Pittston dispute is the most complex labor dispute which I have mediated. Not only do the

parties have to reconcile competing needs into the traditional collective bargaining arena, but they also had to address pressing problems of health care delivery affecting the industry at large and [21] to resolve an extensive list of NLRB and State and Federal litigation in Courts in Connecticut, Washington, D.C., West Virginia, Kentucky and of course, Virginia. All of these tasks involved a considerable degree of compromises on both sides. One of my main objectives throughout the mediation was not just to achieve a Collective Bargaining Agreement, but also to forge a new cooperative relationship between the parties. It is only when this goal is accomplished that the communities at large will prosper. Thus, from day one, I have urged the parties to look to the future, and not to dwell on the grievances of the past. The parties themselves will determine that this goal will require a resolution of a myriad of outstanding litigation. This litigation does not just involve claims against the Union, such as the case over which you now preside, but also a substantial number of claims against Pittston, claims which now will be of interest and part of the over-all settlement. In the hopes of forging this new relationship, I follow with great interest the actions of these other [22] affected parties and their efforts to make this settlement a reality. I gratify that the NLRB General Counsel and Your Honor and various Federal State Judges and the affected States and Counties have acted in a fashion which has moved the parties closer to ratification. Given these circumstances and my desire to avoid any inappropriate intrusion into the judicial process, I would hope that you, too, would be in a position to give serious and favorable consideration to the parties Joint Motion and proposal in order to dissolve the litigation before you." And that's signed, W. J. Usury, Jr. with copies to President Trumpka and Paul Douglas, CEO, Pittston. We believe that that statement adequately supports the Motion before the Court and it further reflects the position and role that has been taken throughout the course of these settlement proceedings by the United States Government.

In summary, Your Honor, again we have a civil case before the Court. There is a Joint Motion and an agreed Joint Order in this case with the parties urging Your Honor's prompt [23] consideration. We respectfully request that the healing process commence as soon as possible. We believe that there is adequate legal support to dissolve the fines and dismiss this lawsuit, given that the nature of the fines as stated by the Court were Civil course and contempt fines. They were not punitive fines or criminal contempt fines, which otherwise would have been required to be directed to vindicate the authorities which issued them. We suggest as well that the public interest at stake overwhelming weighs in favor of dismissal of this case and dissolution of the fines. And we further submit, Your Honor, and respectively so, that the community service commitments that the UMWA is prepared to make and request that Pittston join with us on, will be the first step toward an active and healing process, which we believe will further the interest of this community and also to further the interests of, as I understand it to be, the industrial development of this community that is hopefully planned for the near future.

We thank Your Honor and appreciate your [24] consideration.

THE COURT: Does Counsel for Plaintiffs have any further comment?

MR. KINDIG: Yes, Your Honor. I would just like to reiterate one thing that was said by Mr. Stropp. That during the many weeks that the parties labored in an attempt to resolve this labor dispute, I can say personally that the interest of the community and the interest of this Court were never far from the parties consideration. I think that the resolution of this case is perhaps one of the most difficult aspects of the over-all labor dispute and the resolution of that dispute. And it is clearly, and it was clear to me at the time that we thought about how to resolve this, that the proposal which we have put before Your Honor today is perhaps not likely to be a popular

one. As a matter of fact, I recall reading in one of the newspapers that I should be subject to professional discipline for supporting this particular Motion. Yet, despite that and having considered this at great length, I came to the conclusion that, and the company which I represent came to the [25] conclusion that this result is appropriate. It is appropriate under the law as a resolution of a private civil dispute between parties and it is ultimately in the public interest. And we would respectfully request that the Chancellor exercise its discretion to grant the Motion which we do have before it, before you today, recognizing that it may be unpopular, but it is my sincere belief that it is the right thing to do. Thank you.

THE COURT: Thank you. First let me ask Counsel to be certain that the Court is operating on the same tack that has been argued here. I take it as offered, the Court has been made aware of all agreements. If not, as to having seen the agreements, certainly I have been made aware of the types and general thrust of the agreements between the two parties, is that correct?

MR. KINDIG: Yes, Your Honor.

MR. STROPP: Yes, Your honor.

THE COURT: I know that there are a lot of people in this room who are waiting very anxiously for the Court's ruling; however, I will digress just a minute to say that this is the first [26] day of the term here in Russell County Circuit Court. And albeit somewhat less mundane, we do have other matters going on. I have a Grand Jury which has just recently completed its work and the Court will of necessity have to take a very, very short recess for approximately five minutes, to receive the report of the Grand Jury and to discharge the Grand Jury and ask them if they have any other report. I must recess this proceeding just briefly. If you would all like to stay in place that will be fine.

RECESS

First of all, I think that we should—with regard, first of all to the conferences that the Court has had with Counsel and because of this case of intense interest by the community at large, I think that it would be well for the Court to review briefly the basic content of those conferences with Counsel.

On January 31st a hearing had been scheduled to begin in the afternoon hours. [27] And the Court had a conference with Counsel from both sides. By agreement of Counsel, during which time certain representations were made to the Court as to what evidence would be produced at the hearing and what proposals were being offered to the Court in support of the Joint Motion to Dismiss, at that time the Court discussed those proposals and the proposed evidence with Counsel. And as Mr. Stropp has indicated, voiced some concern that the Court had with the proposals and with the evidence that had been mentioned. The Court was, as I recall the Court's concern basically revolved around the issue of what feeling or what impression would be left upon others who might find themselves in similar circumstances to that of the Defendants in this case. What others might learn from this case with regard to what activity, what conduct would or would not be acceptable in this community. And to put it in plain language, the Court did not want any person or any organization to feel that this Court's Orders could be controlled by individual parties. I should say the Court's equitable Orders and Contempt Orders [28] could be controlled by either party.

This has been an extremely unusual case. Both Counsel have argued that practically from the first day. It's been unusual in that there are very few precedents that the Court has at its beck and call to follow. It's been probably more unusual because of the facts that have been generated over the past ten months. And by that I refer to the mass violations by members of UMW, the refusal of the organizational Defendant, UMW International and the District 28 to obey the lawful Orders of

this Court. The fact that there have been approximately 760 allegations of violations of this Court's Orders by the Defendants, 400 of which the Court has held have been proved beyond reasonable doubt. The others have been dismissed for one reason or the other. It's also been unusual, I am told by Counsel for the Defendants and the Court's response is supposedly unprecedented in the annals of the U. S. Jurisprudence, referring to the large fines that have been imposed in an attempt to compel compliance with this Court's Orders. It's also been a very ironic [29] case that has taken some ironic turns here of recent past. The Court finds that it is extremely ironic that the parties, the Plaintiffs, who came to this Court back in April practically wringing their hands over the violations that were occurring to their rights and extremely upset over the violence that was being visited upon their property and more importantly, their employees, agents. The same Plaintiffs who came in and asked for extremely harsh treatment directed toward the Defendants by this Court from the very beginning. If I am not mistaken at the first hearing, perhaps the second hearing, fines of One Million Dollars per day against the Defendants were requested, but refused. The same Plaintiffs who have requested the Court very strongly, very urgently to effect harsher measures, stiffer penalties until compliance, against the Defendants, those same Plaintiffs now come into this Court and say now everything is fine. We have reached an agreement. We want Your Honor to wipe everything off the slate and forget the whole thing. It is an incredible irony in this [30] Court's opinion.

The Court has several considerations that it must keep in mind. First, legally the classes of the parties that we have here. We have the Plaintiffs and we have the Defendants. Their interests are pretty obvious to everyone. Obvious, for the most part, to the Court. I want to make it clear for the record that although there has been quite a bit of argument about the negotiations, quite a bit of

mention about the negotiations of a labor contract between the parties, which is actually the root of all of these proceedings, this is not a case about a labor contract. This is a case about protecting individual and corporate citizens' rights in the Commonwealth of Virginia and about seeing that peace can be effected in these communities over which this Court has jurisdiction. At any rate, both parties have interests in the Orders that were handed down by this Court and also in the fines that have been assessed. The Court recognizes that. In addition, there are some other ancillary parties and those are the designated [31] recipients of these fines. The Commonwealth of Virginia has been designated as a recipient, as has the Counties of Russell and Dickensen here in Virginia, in addition to the Plaintiffs.

Now, I want to say that the Court acknowledges and has made a part of the record the two responses that were filed or sent to the Court by the Chairmen of the respective County Governments, the Board of Supervisors. And Mr. Stropp, I believe, correctly characterized the input of their letters. The Court has received no notification or no response of any type from the Commonwealth of Virginia. The Court is unaware of any actual notice that has been given to the Commonwealth of Virginia in this case. But at least arguably, the interests of this class of parties is solely dependent upon the Court's discretion in allocating civil penalties, much as the Commonwealth or a County or Town or some other political sub-division would be interested in criminal fines, their own portion made payable to various jurisdictions. The third class of parties is what the Court [32] will consider the public party. This Court is convinced that the public is an interested party, an ancillary party to this suit. And it bases that conclusion upon the fact that this Court was asked as a Court of equity, not a Court of law, to intervene in certain conduct that was being directed toward the Plaintiffs, and to bring to bear against the Defendants the power of the Commonwealth of Virginia. That is done

through the contempt proceedings. And this Court, after hearing evidence, after being convinced that it was warranted and needed, issued Orders, not only to protect the individuals, shall we say, the corporate rights and private rights of the Plaintiffs, but also to protect the public interest in their use of the highways, in their use of the public areas around the various facilities that were involved in this picketing action and other action by the strikers. And the Court has, as representative of the public, therefore has an interest, and some people would argue is a party to these types of proceedings. The primary purpose, not the sole purpose, but the [33] primary purpose of these fines was to compel compliance by the Defendants of the Court's Orders, in order to preserve the rights of the Pittston Group composed of the companies that are the Plaintiffs. However, every time there is a willful violation of the Court's Order, it is an affront to the authority and the dignity of the power, if you will, of this Court and to the people in this community. It is an eating away or tearing down of this Court's power to administer the law. And this Court is convinced, from the law it has read, that this Court, all Courts are vested with the power and charged with the duty of enforcing the Decrees, regardless of the purpose that the Decrees are put down for. Because those Decrees are mandates of law and the Court must have the power to enforce those mandates if organized society is to be maintained.

Now, when an entity is ordered to cease an activity that is violating a party's rights, under the pain of imposition of respective fines or respective penalties, and then the entity goes out and engages in the [34] prohibited conduct and fines are imposed, then the collection of those fines becomes the Court's solemn duty in this Court's opinion. But not only to ensure the rights of the private parties, but also ensure the rule of law. And although it is certainly relevant to the Court's consideration that the parties in this civil suit have come to an agreement with regard to their interests and have asked

the Court to vacate or suspend, what have you, all of the penalties that have been assessed, their agreement is not controlling on this Court. As Mr. Kindig has noted in his closing remarks, it is within the sound discretion of this Court as to whether these fines, as to what will happen to these fines.

The other legal consideration I think that the Court has had before it and must take into consideration is what power and jurisdiction this Court has over those Orders that were entered more than 21 days ago. As I am sure you all are aware, Counsel are aware, there are 21 days in Virginia, a 21 day waiting period, if you will, during which a matter is held within the breast of the Court. [35] After that 21st day it has been held that the Court loses jurisdiction to act as to its judgment. There are arguments, which the Court recognizes, that when it comes to equitable powers and the enforcement of Orders, that the Court can reinstate the Orders to the docket for the purpose of enforcement. I think it is a mixed question at this time whether this Court does or does not have power to effect the first several Orders which I understand have been on appeal now to the Court of Appeals of Virginia. The factual considerations that this Court has had in its mind are myriad. We have had some 25 days of testimony. I haven't gone back to count the number of witnesses that we have heard, but I would dare say that the average day brought 25 to 30 witnesses, sometimes more, sometimes less. That would not count the numbers of days that we have had pre-trials, pre-hearing conferences, and post-hearing conferences. So there are facts for this Court to consider. Among them the massive violations before this Court. As I said before there was 760 some alleged, 400 [36] proved. Of those 400, by the Court's reckoning, two-thirds, 263 involved violations of violence against persons or property, 137 of those violations were non-violent. The Court has also considered the fact that there have been violations of criminal loss. There have been some

212 felony warnings issued that were strike related in these two Counties—I am sorry, in this jurisdiction. There have been 2,337 misdemeanor warrants that have been issued that were strike related. There have been 549 traffic citations. And very steadily, there have been 71 injuries to persons as the result of criminal activity in this area.

The Court has also considered some of the terms of one of the tentative agreements to which the parties have agreed, as seen in camera, by agreement of the parties, must be made public. The Court, without revealing the terms of the agreement which was proposed to the Court or given to the Court in hopes that it would satisfy some of the concern that the Court has about these entities being responsible for their acts, the Court is [37] convinced that although those agreements or that particular agreement may very well satisfy the economic needs of the parties, it does not speak to the interest of this Court. The Court has also considered the willfulness of the acts that have been proved by the Plaintiffs in these cases. There has been an organized, coordinated effort by the UMWA International and District 28 to put into effect mass violations of law and acts of violence. Not only by the individual members, but there has been proof positive beyond a shadow of a doubt that the International leaders have been involved personally with these acts of violence. There has been evidence brought to the Court in these proceedings that the International leaders flaunt the Court's authority to its membership. The Court has also considered the acts that have been offered here and performed here by the Defendants in an attempt to purge themselves of contempt. There has been a statement that was offered here by Mr. Stropp. I would note that there was no—the Court could not discern in that statement any [38] admission of guilt. There was no statement of remorse for the fact that there had been violations of the Court's Orders. Although there was an assertion that the conduct would not recur, I would note for the record that Mr. Hudson, at least Mr. Hudson, who gave a

very similar statement to Judge Glen Williams in Federal Court, has been proven by the evidence in this Court to have violated his promises to Judge Williams, subsequent to being released from prison. And if that is what the Court is to expect from International representatives, then that bodes poorly for this type of an act. And I will put this in parentheses, or in quotations, "an act of contrition."

The Court has considered the voluntarily settlement that the Defendants have entered into with the NLRB. I think that the fact that they did voluntarily agree to an enlargement of the Fourth Circuit Court of Appeal's injunctive Order to encompass Virginia is a step in the right direction. But that does not address this Court's concern. The Union and its membership is [39] already under a very similar Order entered by this Court. As a matter of fact, although the Federal Order may be more detailed and specific about what is prohibited, it has penalties that are far, far less harsh or less severe than this Court's Orders required. For instance, there is a prospective fine that is required on the finding of a violation of \$15,000.00 per occurrence for non-violent violations and up to \$25,000.00 for occurrence for a violent violation. This Court has tried those sums in the previous Orders and found them to be totally ineffective. Thus the unprecedented, if it is that, amounts of these fines that have been assessed in order to get a compliance of this Court's Orders.

The offer to perform community service is an admirable idea. It is noteworthy in that it at least attempts to try to do something for the community which has been so rocked with this—no pun intended—by these activities. But, look at the offer. It is of such a minuscule amount that it is almost an affront to this Court. This Court has put down fines totaling approximately 64.1 Million [40] Dollars. If you allow credit for \$15.00 per hour, which is I think what most or the approximation of what the Union scale would be, at least in the past, for a miner, that's \$150,000.00. That's about two-one-thousandths of

the total fines that have been put down by this Court. It's a little bit more than five hours of community service work per Pittston employee who was out on strike here in Virginia. The contemptuous acts by the Defendants has cost the State of Virginia Millions of Dollars. It's cost these two communities Millions of Dollars. And more importantly, it has cost the individuals in this community something that is far, far more important, far, far more valuable than those Millions of Dollars, and that is the right to live in peace, without fear under the rule of law.

The Court has also taken into consideration that no attempt, no offer to pay any of these fines have been made. There's not even been a claim that the Defendants are unable to pay these fines. And I don't think that with the evidence this Court has heard [41] that that claim could have been made in good faith in any event. And more than that, there's been no showing that the Defendants have done anything to try to educate their membership or try to enforce or obtain compliance with the Court's previous Orders up to today's date.

Now, the effect of this Court's ruling—I am sure that I am not bright enough to delineate or even think of all of the effects. But some that have been weighing on the Court's mind that if the Court agrees to disband or to vacate these fines, hopefully these parties would be able to consummate what the Court is sure is a very, very complex agreement to a very complex set of situations. Honest, hard working persons could go back to their old jobs, earn a living, which is I am sure what they want to do. The local Governments and State Government can stop the diversion of monies and efforts and manpower from needed, other areas of need to control the activities in this strike. The local Governments can start collecting their tax revenues which is sorely needed for the [42] provision of the basic services in this very rural, very poor County. The company could hopefully go back to making a profit, which is what it's in business for, what it's organized for. And hopefully the raw wounds which have been inflicted on this community would start to heal and

we could expect, we hope, a return to normalcy. Those are items that would happen fairly quickly, the Court would assume. In the long term, this Court feels that the effect of the ruling would also be to convince people that by the use of similar Court proceedings by aggrieved Plaintiff companies are valid negotiating tools. That mass violations of the law are a valid means by which to conduct strikes and to get favorable contracts for companies. That violence is a an authorized and valid means of conducting a strike and effecting an economic term in a contract. It would also tell other people that this Court's Orders and all Courts' Orders do not have to be obeyed. That the law doesn't govern Southwest Virginia, but only the terms that are negotiated by private parties to these type of proceedings. It [43] would also tell men and women in organizations that they are not responsible for their acts.

The Court has attempted to weigh these various considerations in deciding what to do in this case. There is an old adage in the law that he who seeks equity must do equity. And although that maxim did not arise in cases like this, I think it's applicable. So I look to see what, in the long run or when you get to the bottom line, what have the Defendants done to deserve leniency by the Court. Considering the fact that the Court must be sure that both parties, all parties must know and understand that Courts are not pieces on a game board to be manipulated and used by the players as they will. The Court, the Orders of the Court are not bargaining chips; that the power of the legal system, here in Virginia at least, is not for sale and that the Courts of the Commonwealth will not be prostituted to dispute between two economic giants. This Court does not, cannot bargain. The Court will not be pressured to accept the arguments of the terms and conditions merely to see the settlement of the contract. The [44] simple fact is the Court's decisions are not subject to negotiations, and until this Court sees clear evidence of contrition and of good faith efforts to purge this

contempt, then and only then will the Court consider to do away with the penalties that have been assessed. The Court does not consider what has been offered to come close to a purging of the contempt.

The Court will hold this matter open for ten days, during which the Defendants are invited to present evidence that they have made a good faith effort to purge their contempt and show what the Court would consider sincere contrition. If the Court has no evidence within ten days, then a final Order will be entered, without further argument.

Now, housekeeping here—there have been several requests by Special Commissioners in Chancery which have been appointed by the Court for approval of their fees and expense. The Court has reviewed those and the Court will approve all of those fees and expenses which have been incurred to date, and orders [45] that the Plaintiffs in this case pay all of those fees and expenses. In view of the fact that the Special Commissioners are now in a position where they must come in and ask this Court to dismiss fines, the Court feels that the interests of the public and the Court are no longer the same as those of the parties Plaintiff in all regards, and order at this time that Mssrs. Hodges and Massie be relieved of their duties as Special Commissioners, with thanks for a job well done. But I think under the rules of ethics and the way these cases have come before us, it would not be fair to ask you now to take a position that would be contrary to your clients, to the requirements they desire, so the Order will be effective immediately that Mr. Massie and Mr. Hodges are relieved of their duties. And the Court will appoint new Special Commissioners. Are there any questions about the Court's ruling?

MR. HODGES: No, Your Honor.

MR. STROPP: No, Your Honor.

THE COURT: Very well, Court is adjourned.

* * * *

[1]

VIRGINIA:

CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
 OF AMERICA, *et al.*,
Defendants

Lebanon, Virginia

May 16, 1989

BEFORE:

HONORABLE DONALD A. MCGLOTHLIN, JR., JUDGE

APPEARANCES:

STEPHEN M. HODGES, ESQ., Abingdon, Virginia
 WADE W. MASSIE, ESQ., Abingdon, Virginia
 KARL KINDIG, ESQ., Lebanon, Virginia
Counsel for Plaintiffs

WILLIAM O. SHULTS, ESQ., Washington, D.C.
 JAMES J. VERGARA, JR., ESQ., Hopewell, Virginia
Counsel for Defendants

* * * *

HUDSON—DIRECT

[25] Q Do Mr. Trumpka and Mr. Roberts give you directions from time to time on how to conduct the strike?

A Yes, they tell me how to conduct it, ask what is going on. I say this is going on. They say well—just reiterate they don't want violence.

Q Have you reported to them what has been going on during this strike frequently?

A Yes, pretty much on a steady basis.

Q Have they ever told you or instructed you to do something different from what you have actually done down here?

A Yes.

Q What have they instructed you to do differently

[26] A Well, we had people arrested throwing rocks. They basically told me that is not to happen no more. That better not be happening.

Q And you went to work to be sure that didn't happen any more, is that right?

A I try my best.

Q Is that the only thing they told you not to let happen any more?

A They told me other things. I would have to sit here and try to recall. I don't know right offhand.

Q I am asking you if they have told you to get anything stopped other than rock throwing, as you recall.

A They just reiterated that they didn't want violence. They didn't want confrontation, you know, that they didn't want those kind of problems.

Q How about jackrocks, did they say anything about jackrocks, or putting nails in the road?

A That is all part of the violence.

Q So you agree that putting jackrocks, nails in the road is violence, is that right?

A Yes, since I have gotten five flats myself at the Holiday Inn, I agree it is pretty violent.

* * * *

[28] Q How about Vernon Potter, does he work for the International?

A Yes.

Q Did you forget him?

A Sorry, I forgot Lee Potter.

Q He is an employee of the International Union, I believe?

A Yes.

* * * *

[30] Q Is there any part that you haven't complied with?

A What specifically are you talking about?

Q Is there any part that you know of that you haven't complied with?

A There is the limit probably to the number of people that was allowed there.

Q Now you know that the injunction provides that pickets are limited at 17 separate sites and the number of particular pickets are limited between fifteen and four at the various sites, is that correct, Mr. Hudson?

A That sounds—yes, without recalling the exact number, I think so.

[31] Q Since April 24 and May 10, has that provision of the injunction been complied with?

A You mean where at?

Q Limit to number of pickets, has it been complied with?

A I would say yes and no.

Q Has it been complied with at the Moss No. 3 preparation plant?

A Yes and no.

Q When was it not complied with?

A I don't know the dates, I guess that there were more people there. You have to understand there are 1300 people here that have got to go somewhere. They don't just sit at home. They don't have jobs.

Q I take it you told them not to come out there, is that what you are telling the Court, Mr. Hudson?

A No, I never told them not to come out there. I don't control people's lives. I try my best to coordinate their activities.

Q Mr. Hudson, you coordinated the appearance of hundreds of picketers at the Moss No. 3 preparation plant every day from May 24 right up to the present, did you not?

A I have tried to maintain that there wouldn't be violence on the picket lines.

[32] Q Mr. Hudson, I am asking you if you coordinated the appearance of hundreds of pickets at the Moss 3 preparation plant on every day between April 24 and May 10?

A Well, what do you mean when you say coordinate? Tell me.

Q What do you mean? You are the one who used the term.

A Well, coordinate, just tries to coordinate the people's activities and what they are doing.

Q Do you have a strike schedule that tells people what people to be where on what days?

A No.

Q You don't have any such thing as that?

A I don't have a schedule that says—

Q How do the picketers know where to go on any given day?

A Well, they, you know, they get phone calls. They have local union meetings. They decide like where they are going to be.

Q They decide where they are going to be, is that right?

A They decide with proper, I guess, you know, advice on where they should be.

Q Who gives them the advice?

[33] A Well, it originates from myself.

Q So you are really in charge of how many people and what people are going to go on a given day, aren't you, Mr. Hudson?

A I guess I am to some extent. To the extent that you can tell people what to do, who is fighting for a job, which is not, is not every day, that is for sure.

Q You tell them what to do. You tell them to come to the picket lines at Moss No. 3 and they come, by and large, is that not correct?

A They all don't come. I guess a lot of them do.

Q Have you ever told more than 20 pickets on a given day to go out to the Moss No. 3 preparation plant between April 24 and May 10?

A I probably have, yes.

Q You have told hundreds on every one of those days to be there, have you not, Mr. Hudson?

A I probably have.

Q On many of those days you have coordinated and instructed them what to do with the bullhorn, have you not?

A I don't know what you mean.

Q Do you have a bullhorn, Mr. Hudson?

A We have six or eight of them, they are there for crowd control.

[34] Q Do you announce and tell people what to do over the bullhorn?

A From time to time, I announce updates, you know, what the activities are. When you have got 1300 people you have to utilize the people. They can't be standing around idly like looking for something for them to get into.

Q How have you utilized these people at the Moss No. 3 preparation plant between the dates I have mentioned?

A We have had, you know, arrests, mass arrests of people exercising I guess their beliefs and standing up for, try to bring attention to what Pittston has done to their fathers and mothers and what Pittston is doing to them, taking their jobs and giving them to people out of the state. That is what they are trying to demonstrate.

Q Have you instructed the people to sit down on various days at the Moss No. 3 preparation plant and obstruct the trucks from going in and out of the plant?

A I have never gave anyone an order and say, "You have to do this." Have I suggested to do that, yes.

Q You have participated in those activities yourself, have you not?

A Yes, I have.

Q Some of those activities occurred between the 24th of April and the 10th of May?

[35] A Yes, I have.

Q Some of those activities occurred between the 24th of April and the 10th of May?

A Yes.

Q You were arrested yourself, were you not?

A Yes, I was.

Q You were sitting down, were you not?

A Yes, I was.

Q What day was that that you were arrested on?

A I don't even recall. They all run together.

Q Jackie was arrested also for sitting down out there, was he not, Jackie Stump?

A Yes, he was.

Q Have you instructed some of the wives or family members of the union members to come out and engage in the sitdown activities?

A Have I instructed them?

Q Yes, have you asked them to come out?

A Yes, I have asked them to come. It is their livelihood also. It is their fight that they should be there with their husbands.

Q I just asked you if you asked them to come out there, Mr. Hudson. You can just answer that question, if you will.

[36] A There is a reason for asking them to come out.

Q Did you ask them, and I believe your answer is yes.

A Yes, it was.

Q Did you invite them to sit down in the roadway on some days and block the trucks?

A Yes. I mean I invited them, means I suggested it, yes.

* * * *

STUMP—DIRECT

[55] Q What I am asking is, directing people to be at Moss No. 3 as opposed to McClure on a certain day.

A Mr. Hudson and I work hand in hand. He works for the International and I work for the District. So I get to voice my opinion on anything. He has the final say. Sure, we work hand in hand.

* * * *

[56] Q What did you do to communicate that to members of your organization?

A We got copies of it out, posted at the picket shacks, informed the people.

Q At all picket sites?

A To the best of my knowledge all picket sites.

Q What did you do to enforce violations of that injunction?

A Well, as far as violations with the rock throwing, alleged rock throwing, jackrocks, we instructed our people that was not the type of strike that we intended to run. We set out in this goal back in '87 to run a non-violent strike, to run one different than the mine workers had ever run before, and that is what we preached to the people since then.

Q Since '87?

A Yes, sir.

Q What have you done to stop the blocking or the mass picketing?

A I can't say that we have done anything to stop that.

Q I believe your office was served with a copy of the amended injunction on April 22. Didn't you read it?

A Yes, sir.

[57] Q Did you disseminate it?

A Yes, sir.

Q How did you do that?

A The same way we do the others, to the picket shack.

Q What have you done to stop mass picketing or blocking under that injunction?

A There is still, has been mass picketing?

A What have you done to stop it?

A Nothing at this point.

Q Have you ever received any instructions from the union leadership to stop mass picketing or blocking? I am talking about the International.

A Personally myself I haven't had any conversation with them.

Q Have you received any injunctions from them that you should stop that?

A Personally myself, I have not.

Q Do you know of anyone else in your District organization that has received such instruction?

A I can't speak for any of the people. I don't know of any myself.

Q One of the provisions of the amended injunction was that any violations of it should be reported to the Court. [58] Has anyone done that?

A Excuse me?

Q One of the provisions of the amended injunction was that any violations of it, that you know of should be reported to the Court. Have you or anyone on your behalf done that?

A We have kept reports of the activities, I think, as requested. But as far as to say personally have I contacted the Court, no, sir, I haven't personally contacted the Court.

Q To your knowledge has any such list of violation been provided to the Court?

A At this point I don't know for sure.

Q But you have a list of all violations, is that what you are saying?

A We instructed our people as the Court has instructed to keep down the things that went on and our people have been instructed to do so.

Q I am sorry, what did you say?

A I say our people have been instructed to keep down the violations and things, I think, as the order reads to each and every picket line to keep up with—

Q Keep them written down you mean?

A Yes, keep a log, yes.

* * * *

KVASNICKA—DIRECT

[108] A At that point there was not much we could do. We only had a few troopers and no transportation, so we just waited.

Q Did you make any request of the picketers to move?

A At that point, no.

Q Did you later?

A No, that day we had insufficient people to move anybody, so we didn't make, you know, any orders that we couldn't back up.

Q How did the situation end that day?

A Later in the day, approximately 4:00 o'clock, they began to break up and eventually they all left.

Q Was there any traffic in or out that day?

A None.

Q To Moss No. 3 plant?

A None that I am aware of.

Q Were any leaders there that day to your knowledge of the strike from the union's standpoint?

A Yes, sir.

Q Do you know any of them by name?

A Yes, sir.

Q Who was there?

A Marty Hudson, Jackie Stump, John Cox, C. A. Phillips.

[109] Q What was the situation the next day on the twenty fifth?

A The twenty-fifth I arrived about the same time and there were virtually no large numbers, just a few pickets at each location. It was like that until about 10:00 or 10:30, they started gathering back at the Moss No. 3 prep plant and I think it was around 11:30 they attempted to bring a loader out of the preparation plant and at that time they blocked the road.

Q One of the company people attempted to bring a loader out?

A Yes.

Q How many picketers were involved that day?

A Over 500.

Q What did you do in response to the situation?

A On that day we had sufficient man power where we ordered them to clear the roadway and told them if they did not they would be arrested and they did not and we arrested approximately 450.

Q Was Mr. Stump one of the ones arrested?

A Yes, sir.

Q Jackie Stump?

A Yes.

Q Did you arrest him yourself?

[110] A Yes, sir.

Q Did you ask them to move before you arrested them?

A Yes, we made an announcement over the public address system that they were in violation of state law and if they did not move and clear the highway that they would be arrested.

Q Was Mr. Hudson there that day?

A Yes, sir.

Q Did you have any discussion with him about moving the people?

A When we—not when we made the announcement.

Q Later that day?

A Yes, sir, I did talk to Mr. Hudson later that day.

Q What discussion did you have with him?

A It was a point where we had arrested, like I said, about 450 people. We talked about the fact that they, every time we would arrest a group, they would send another group in. We talked about, I think the exact words was it could go on all night like that. They could keep sending them in and we could keep arresting them.

* * * *

[117] Q During the period of time between the eighth and the thirtieth, when you were at the picket site, did you have occasion to get to know Mr. Hudson and Mr. Stump?

A Yes, sir.

Q See them on a fairly regular basis?

A Just about daily.

Q Did you have occasion to have conversation with them?

A Yes.

Q Have you had occasion to observe them dealing [118] with the other pickets that were there at the site?

A Yes, sir.

Q Did you ever hear Mr. Hudson or Mr. Stump engaged in conversation with the pickets concerning whether the conduct of the picket line should be peaceful or violent?

A Peaceful.

Q Peaceful. When did you hear them say that?

A Each time we made arrests, especially when there were large numbers of arrests for blocking the roadway, they constantly urged them not to resist, to be a peaceful demonstration.

Q You say constantly? Would it be more than one time on any given day?

A Yes, during the entire arrest process.

Q Did you ever have any occasion while the arrests were taking place where something would happen that you would feel there is some tension escalating in the air?

A Yes, sir.

Q Did you ever have any of the union leaders intervene to calm people down?

A Yes, sir, we had an incident where some women were being arrested. One of them resisted and got them pretty riled up and came and asked could I give them a few minutes to calm their people down.

[119] Q You say they got riled up. Who got riled up?

A The other pickets, the men on the picket line.

Q Did they in fact calm the people down?

A Yes, sir.

Q How do you describe the demeanor or conduct of the people who were actually arrested?

A For the most part very passive. They either just were very limp or had to be carried to the buses or they got up and walked to the buses. We had very few instances that there was any resistance at all.

Q Did it appear at Mr. Hudson's and Stump's request that everything remain peaceful was working?

A Yes, sir.

Q During the time you were there, was either Mr. Hudson or Mr. Stump arrested?

A Mr. Stump was.

Q Did you have any difficulty arresting him?

A No, sir.

Q I believe you said it was April 26 that you found a number of vehicles parked along the road.

A Yes.

Q Did I understand you to say that you talked to either Mr. Stump or Mr. Hudson about that?

A Both.

[120] Q They did arrange to have people move the vehicles?

A Yes.

Q I believe you said on April 28 there were quite a few people who would come to the picket site and then leave and then a little bit later another group would arrive?

A Yes.

Q Did those people attempt to stop traffic?

A No.

Q Do you know how long they remained there before they would leave?

A It varied. The first group came in that morning, probably stayed a half hour and then disbursed. It is difficult to say how many each time, but you know, varying groups would come in and out of the area. Stay for a while. A few minutes to close to an hour and then leave.

Q You were present during that course of events?

A Yes, sir, all day.

Q Did those different groups that came in cause any problem?

A No, not any.

Q You indicated that there had been jackrocks and nails found along the road almost every day.

A Yes, sir.

Q Did you determine the source of those jackrocks [121] from that?

A No, sir.

* * * *

[122] Q Did you ever see Mr. Hudson or Mr. Stump try to restrict the number of people at Moss No. 3?

A No, sir.

Q Or restrict the blocking of the road?

A No, sir.

* * * *

INGERMAN—DIRECT

[125] Q Can you describe what the situation was with respect to objects in the road, jackrocks, things of that nature?

A Jackrocks in the road, that was a constant hazard that we had to deal with. Had troopers on patrol to pick them up. Used a magnet truck trying to pick up the majority of them.

* * * *

INGERMAN—CROSS

[131] Q You have indicated you have seen some vehicles that had windshields broken.

A Yes.

Q You don't have any personal knowledge as to how or when they were broken?

A The only incident I can recall with any detail would be the incident where the truck was damaged up on Route 600 on Olive Branch.

Q That wasn't actually the picket site?

A No, sir, it was not.

Q You don't have any personal knowledge as to who may have thrown rocks or jackrocks?

A No, sir.

Q Did you see Mr. Stump and Mr. Hudson almost every day that you were on the picket sites?

[132] A There may have been a day or two I didn't see them, but pretty much I saw them every day.

Q When you did see them did you talk with them?

A Yes.

Q I believe you said you developed a pretty good line of communication with them.

A Yes, we tried to maintain a good line of communication.

Q Were they for the most part cooperative in working with you?

A Yes, sir.

* * * *

[134] Q Mr. Stump did cooperate with you in talking with the crowd?

A Yes, sir.

Q You never identified where the rocks had come from?

A They came from a cliff above the troopers. It was known several pickets were in that area.

* * * *

STRONG—DIRECT

[158] A About 7:15 a.m. the 50 to 60 people at the gate moved from the gate down the road and blocked the traffic coming into the mine.

Q How did they block it, Mr. Strong?

[159] A They sat down in the road.

Q Did you observe that?

A Yes?

Q Did you have any event with respect to your personal vehicle on that day?

A Yes, at approximately 2:00 p.m. that day I followed a delivery truck out of the mine gate and approximately 1500 feet from the mine gate I passed a group of approximately 15 pickets and immediately when I passed them I received an impact to my vehicle and proceeded on down about another thousand feet to where some state police were stationed and stopped the vehicle and observed a large dent in the right rear quarter panel.

* * * *

STRONG—CROSS

[163] Q Mr. Strong, the photograph that was introduced I believe it is as Exhibit 22, that has a picture of you by a vehicle with a dent in the fender?

A That is correct.

[164] Q It would be correct that you have no knowledge as to who or what caused that dent?

A I did not see a specific individual throwing anything at that vehicle, that is correct.

* * * *

[166] Q . . . When you got the dent, were you within throwing distance of some picketers?

A Yes, I was within three to four foot of a group of approximately 20 pickets.

Q Have you ever had any dents in your car going to or from work other than during a strike in all these years you have been working, in the body of your car?

A No.

* * * *

CHURCH—CROSS

[175] Q Other than either standing or sitting, did you observe any other behavior by these people?

A Behavior?

Q Is that all they did, either would be standing or sitting?

A As the time went on, there was chanting and singing and things like that.

Q Essentially a peaceful group?

A Peaceful, violating the law, I don't know if that is peaceful. It is a breach of peace, I believe, that they were blocking the road, so I can't say that they were peaceful, but they weren't violent.

Q Their methods of blocking the road were peaceful were they not?

A Yes.

Q Were you present when the people were arrested?

A Yes.

[176] Q Was there any problem in the course of the arrest?

A We didn't have any difficulty. All the people that we were going to load, especially in the first three lines, of people seated on the road, we had to physically take them and place them on the bus.

Q Take them, you mean you had to lift them up?

A Yes, had to lift them up and after the first three rows they pretty much got up on their own.

Q I believe you mentioned that you had seen some vehicles that were damaged on the twenty-fifth.

A Yes.

Q Were you able to identify the course of any of that damage?

A I don't know. We didn't know who did it.

* * * *

[178] A On May 4 I and my shift of troopers arrived at McClure No. 1. There were numerous pickets there that arrived there between 6:00 and 7:00. And they all

went up Route 773 which goes into the main gate there at McClure No. 1 from the intersection of 63. And they congregated around the gate there, maybe 100, 125 to 150 people. They congregated across the road, blocking the road. A short while later, maybe 10 or 15 minutes, they all continued back down the road about half or three-quarters of a mile. They all congregated there in the road again. All of a sudden there was kind of a dispersement and 20 of these people sat down in the highway.

* * * *

DUFFEY—CROSS

[181] Q Have you had occasion to talk with either Mr. Hudson or Mr. Stump from the union?

A I have talked to Mr. Stump.

Q Have you discussed with him whether the conduct was designed to be peaceful or violent?

A On May 4, I congratulated Mr. Stump for his peaceful demonstration there and the way the people acted.

* * * *

[184] Q Was an effort made to clear the road of these materials every day?

A Yes, sir.

Q Every day do the jackrocks reappear?

A Yes, sir.

Q When activity is afoot there at the picket line is there any way you can tell when something is going to happen?

A Well, basically when you see a lot of the higher ups, which I mean Mr. Stump or some of these other people higher in the union, start coming into a particular area, you can expect something.

* * * *

DUFFEY—REDIRECT

[185] Q Sergeant Duffey, the jackrocks that you have mentioned, do you have any firsthand knowledge as to who placed them on the road surface?

A Well, I have heard both sides, firsthand knowledge. Last week I just about caught a gentleman. I was up on the mountainside watching through binoculars but I think he got wind of me and took off.

Q You have no firsthand knowledge?

A No, sir.

Q Would it be safe to say that these devices that you have described in the road do not discriminate between union tires and company tires?

A No, sir.

* * * *

TOMPKINS—DIRECT

[187] Q Trooper, have you been sworn earlier?

A Yes, sir, I have.

Q Would you state your name, please.

A Randy Lee Tompkins.

Q Your occupation?

A Virginia State Trooper.

Q Have you been assigned to the Southwest Virginia area in connection with the strike?

A Yes, sir, I have.

Q What period of time have you been here?

A I came April 29 up to this date. I have been here the entire time.

[188] Q What areas have you been working?

A I have been stationed in the area of McClure No. 1.

Q Were you there on May 9?

A Yes, I was.

Q Did you make any arrests that day?

A Yes, sir, I did.

Q Would you tell the Court what arrests you made.

A I made an arrest on Vernon Lee Potter.

Q How did that come about?

A I observed Mr. Potter first drop a jackrock as the truck was passing and then he attempted to kick it underneath the tire of a passing vehicle.

Q What happened after that?

A After that I went toward him. He quickly went towards the guardrail and almost in a running motion.

When he got to the guardrail, he was throwing more jack-rocks over the side of the guardrail.

Q Did you see how many he threw out?

A I seen so many flying, he got some of them quite a distance. Some of the other troopers picked them up. There were six picked up immediately at the guardrail.

* * * *

IRVIN—DIRECT

[212] Q On the 26th of April of this year were you in a coal truck convoy going from Lambert Fork over to the Moss No. 3 preparation plant?

A Yes.

Q Did you have any damage to your truck on that trip?

[213] A Yes, I did.

Q Did you get rocked?

A Yes.

Q Did you see who rocked you?

A I just saw the crowd.

Q What did the crowd look like?

A They were dressed in camouflage, about 10 or 15.

Q Was this on Route 63?

A Yes, I believe it was.

Q Was your truck damaged?

A Yes.

Q Let me show you Exhibit No. 27 and ask you if that is the picture of you and part of your truck?

A Yes, it is.

Q Does that show the damage that occurred to your truck on that day?

A Yes, sir.

MR. HODGES: We offer that as Exhibit No. 27.

THE COURT: Any objections, gentlemen?

MR. VERGARA: No objections to the admissibility, the only objection would be whether a foundation has been laid to link this photograph in any way to the defendants. It seems to me we are here today as to evidence

by the defendants. It seems to me most of the [214] photographs that have been introduced certainly are not objectionable, as far as photographs, but whether they proffer any conduct or activity by the defendants, on that basis we would object as to the relevancy to the defendants.

THE COURT: All right.

MR. HODGES: Certainly not conclusive of anything your Honor, but it has been shown here that the uniform of the picketers was camouflage clothing and other photographs have been exhibited here and received without objection on the same trip to other trucks, that were thrown by camouflaged people along the roadway I think the Court necessarily would have to take reasonable inferences from some of this testimony.

THE COURT: This is circumstantial evidence as to the identity of the rest of the damage that was done by people who were supposed to be in camouflage. Of course, according to the theory of the plaintiffs, that could be taken to mean they were picketers. Of course, that isn't conclusive and the Court will accept this evidence and overrule the objection, subject to it being tied some way to the defendants.

MR. VERGARA: That was our point. We do not object to those photographs as far as representing [215] damage to the vehicle and, quite frankly, that was my, I guess perhaps even my error, but I assume the purpose of most of the photographs previously had been for the purpose of showing damage. I was concerned that the introduction suggested a direct link. Having heard the Court indicate circumstantial, I don't have the same reservation.

THE COURT: I am just speaking as for this one photograph, Mr. Vergara. I am not making any comment with regard to the others.

MR. VARGARA: Yes, we can make comments in regard to the others in argument.

* * * *

[217] Q Did you encounter a rocking incident on that trip?

A Yes, sir, sure did.

Q Was your truck hit with rocks?

A Yes, sir.

Q Were there any picketers along the road at the time the rocks came at you?

A Yes, sir, there sure was.

Q How were they dressed?

A Dressed in camouflage.

Q About how many picketers were there along the road, do you have any idea?

A Probably 75 to a hundred.

* * * *

SHOUPÉ—CROSS

[219] Q You have no personal knowledge as to the source of whatever it was broke your windshield?

A No, sir.

* * * *

MEADE—DIRECT

[221] Q Now in that instance I take, you got your truck, had a dent or scrape in the door the first incident?

A Yes, it had a nick in the hood.

Q And then the next day did you have another incident?

A Yes, sir, I did.

Q Where did that occur?

A At the picket shack, at the intersection of 615 and 616, Carbo.

Q Is that what they call the Carbo intersection?

A Yes.

Q Were there pickets present at that time?

A Yes.

Q How were they dressed?

A Everyone in camouflage.

Q Did some hit your truck?

A Yes.

* * * *

MEADE—CROSS

[223] Q Do you have any way of knowing if all the people you see along the road are members of the union?

A No, sir, I don't.

Q Do you have any personal knowledge as to who is responsible for the paint on your vehicle?

A I couldn't see who threw it.

* * * *

TAYLOR—CROSS

[239] Q Do you know what caused the damage that is shown in that picture?

A Not exactly. I didn't see it.

Q Do you know who caused the damage shown in the picture?

A The only thing, when I was going up through there my buddy riding, he hollered, "We have been hit."

* * * *

THOMAS—CROSS

[243] Q You indicated you felt there were three people around the shack.

A There were three standing with camouflage clothes on.

Q You were approaching the shack and these three people and before you got to the shack something strikes your windshield?

A Yes.

Q Since you testified there were three, I assume you saw those three people?

A I saw three standing on the side of the road.

Q Did you see anyone throw anything at your windshield?

[244] A No, I didn't.

Q You did not see those people make any movement toward your vehicle?

A No.

* * * *

SWINDALL—REDIRECT

[251] Q Mr. Swindall, were you able to identify anyone throwing anything at your vehicle?

A No individual person, no, sir.

Q How long have you been in Warehouse 6?

A Warehouse 6 since 1959.

Q Do you know a lot of people that you see on the picket areas?

A Yes, I do.

Q Is that because you have worked with them over the years?

A Yes.

[252] Q Do you know others—

THE COURT: I can't hear.

BY MR. VERGARA:

Q Do you know others that you have seen within the community?

A Yes, I do.

Q On these days in question there is no one you can identify as someone—

A No, just a mass of green camouflage.

* * * *

AUKERMAN—DIRECT

[259] Q What happened over say the next 30 to 45 minutes?

A We sat there for a long time and there just got to be more and more of them. When they got to be 40 or 50 of them, they started ganging up around us.

Q What do you mean "ganging up around you?" Were they surrounding you and the other truck drivers?

A Yes.

Q Were they talking to you?

A Yes, causing us, telling us, "This is one run you are not going to make." They told us that they were going to burn us in our truck.

Q Did this persist over some period of time?

A Yes, it went on for probably about, between that and what happened, about two hours, I would say.

[260] Q How many picketers finally arrived at the maximum number by your estimate?

A I would say approximately about 150 or 200.

Q Did they finally offer you the opportunity to turn around and leave?

A They walked back to the man that was in the tractor and trailer, first tractor and trailer said, "If you all will turn around and leave, we will leave you alone." They said, "If you don't, we are going to burn you in your truck."

Q How did you fellows respond to that?

A He called on the CB, just in front of us, he said, "We better try to turn around and leave." We started to go back to our trucks. While I was walking back through there they followed me and one throwed a rock and hit me in the back of the head.

Q Did it cut you or wound you in some way?

A Yes, I got six stitches.

Q As I understand at that point you all had these threats of being burned and you decided to turn around and go back?

A Yes.

Q And you walked back towards your truck?

A Yes.

[261] Q Did you get in your truck?

A Yes.

Q What did you attempt to do?

A I attempted to turn around.

Q Did you get turned around?

A I got halfway and a white Camaro pulled up in front of me and blocked me.

Q A black Camaro?

A A white one.

Q A White Camaro. Then what happened?

A When he done that, they all started throwing rocks and jerked my field lid off my truck. I just couldn't see anything. They were throwing so many rocks at me.

Q Did they damage your truck?

A Yes, sir.

* * * *

[262] Q Did you then try to pull on out, even though your truck was being rocked?

A Yes.

Q Did you get a little ways up the road?

A Uh-huh.

Q What happened then?

A After I went probably, after I finally got turned around. I went probably 40 or 50 feet and then they left me alone. After I got through them, they left me alone. I turned around and seen dad coming through and they was rocking him.

Q That is your dad, Jesse Meadows?

A Yes.

Q You looked back and saw him, he was behind you?

A Yes.

Q What condition was he in?

A When I seen him, he was knocked out over the steering wheel.

Q Did you get your jaw injured in this incident you told us about?

A Yes.

[263] Q How did that happen?

A Whenever I was attempting to turn around, they busted all my windows out except for one vent glass, and I had my head—one threw it through the right side and it hit me.

Q Was he on the dashboard?

A You mean on the side of my truck?

A Yes.

Q Was he right at the window?

A They was jumping on the side of my truck and throwing.

Q He was right at your window and threw a rock and broke your jaw?

A Yes.

Q You have a broken jaw?

A Yes.

* * * *

FLACAVENTO—DIRECT

[280] Q Go ahead.

A Well, when I started going up there, quite honestly, I was skeptical of the UMW's commitment to the non-violence. I was very interested and glad that they had professed that publicly, but I was skeptical about it. I am not quite sure why, but I was. Then what I discovered over the period, I had been there about 10, 9 or 10 days over the last three weeks, as I discovered that there was a very deep commitment to it and very consistent—

MR. MASSIE: Excuse me. If the Court please, I object. This is a conclusion.

THE COURT: Sustained. You cannot testify, sir, as to what your conclusions are. You may testify—the question was were you talking to the individuals and had you heard what their plans were with regard to how the strike would be conducted. If you have heard what they said as to how they would conduct the strike, you may testify to that.

[281] THE WITNESS: May I testify in terms at the picket lines what I heard them say?

THE COURT: That was the question.

MR. MASSIE: We would have our same objection. I think it is hearsay, an out of court statement, self-serving. It is not being offered as an admission against the union but something being offered in favor of. We don't think it is admissible, Judge.

THE JUDGE: Your clients have attacked the union for having violated the terms and conditions of this injunction and have at least implicitly suggested that the union is behind a lot of violent acts. I think the testimony goes to rebut that and I will allow it.

BY MR. VERGARA:

Q Please continue.

A On a number of occasions I heard and saw John Cox, Marty Hudson, Jackie Stump, and then on some other occasions I believe Rick Blaylock, both prepared the miners for the arrest and repeatedly state in the preparations as men and women were sitting down that they were not to resist arrest, repeatedly say that, that it was to be a peaceful arrest process. On an occasion following the incident where some miners were hit by the pickup truck, I was at Moss 3 [282] then and was there when Marty Hudson returned—

MR. MASSIE: Excuse me. I don't believe there has been any testimony in the case as to the fact that he attempted to state just now and I move that it be stricken.

THE COURT: He was not there. He is not shown to have been there.

MR. VERGARA: I think Mr. Meadows testified about the truck and the trooper this morning testified as well.

THE COURT: There has been testimony I believe by Mr. Meadows concerning the pickup truck, driving into the miners.

BY MR. VERGARA:

Q Please continue.

A I was at Moss No. 3 subsequent to that and Marty Hudson returned and hopped up in a pickup truck and there was a great deal of attention and anger among the crowd that was gathered around and I heard him say, "We will not return violence for violence. We will keep this on our terms. We will do this non-violently."

I heard Jackie Stump and John Cox repeatedly urge the miners of another tense incident which I am not sure whether I can say happened or not. I was there. Perhaps I [283] allegedly saw it happen. Where a young woman got into a scuffle with the state troopers and in spite of a great deal of tension, I repeatedly heard Jackie Stump and John Cox in that case urge them to remain calm, to stay seated, to keep it non-violent. In every case that I have seen arrests, that is precisely what I have seen.

Q You mentioned an incident where a young lady was arrested, and I think you indicated that several gentlemen urged the people to be peaceful. Was there a sit-in taking place at that time?

A Yes, sir, there was.

Q Were there people seated in the road at that time?

A Yes, there were.

Q Did any of the people seated in the road attempt to get up while this lady was being arrested?

A My recollection is that a number of people stood up but when they stood up they were urged to stay in place, not to cross the road where the incident was taking place. The troopers, four or so troopers were in a scuffle with a young woman. They were urged to stay in place. In fact, I think they were urged to sit back down. I am not sure of that. I know they were urged to stay put.

Q You mentioned you have seen them prepare for [284] the arrest, is that correct?

A Yes.

Q Can you explain to us what you mean by prepare for the arrest?

A Well, what I have seen typically that as they sat down, they are told how the arrest will occur, something about the troopers coming across and taking them to the buses. They are urged not to resist, more than urged, they are told not to resist arrest. They are always, typically is a prayer that is offered by somebody, one of the ministers in the group, right before the trooper crossed the road before the arrest.

Q You indicated that initially when you began to visit the picket line you were skeptical as to the commitment to peace.

A To a non-violent strategy, yes.

Q Has your mind changed?

A Are you asking my opinion?

MR. HODGES: I object to his opinion.

THE COURT: Sustained.

BY MR. VERGARA:

Q You mentioned Mr. Hudson, after some people had reportedly been struck by a pickup truck, urging to calm the crowd and remain peaceful.

[285] A Yes.

Q Did anything else take place that afternoon after he talked to the crowd about remaining calm?

A During the time that I was at Moss No. 3, after the crowd had gathered around the truck and he had encouraged them to remain calm and not to return violence, I don't know exactly how much time, but I would say within an hour subsequent to that, there was another series of peaceful arrests that occurred right there at Moss 3. They did sit down again and people were again arrested without incident, if I recall.

* * * *

[288] Q Sir, have there been people from your church organization who have been arrested for sitting in the road?

A Do you mean from the Catholic church or from my organization?

Q I am sorry, from your organization.

A Yes.

Q Did anyone from the union order them to sit in the road?

A No.

MR. VERGARA: Thank you, sir.

RECROSS EXAMINATION

BY MR. MASSIE:

Q When were people from your organization arrested?

A Friday of last week, was myself.

[289] Q So that would be Friday what?

A I reckon it was the twelfth, the twelfth.

Q Outside I guess the scope of these rules. Were you the only one?

A From my—

Q From your organization?

A We have a relatively small staff, yes.

Q How many are in your organization?

A My staff is four people locally, myself included.

Q You were the one that got arrested?

A That is correct.

Q That is for blocking the road?

A That is correct.

Q Criminal offense?

A A misdemeanor, I understand.

Q Misdemeanor. Did the police tell you to move before you were arrested?

A An officer came up and said that if we did not move, we would be arrested.

Q And you stayed there anyway?

A That is right.

MR. MASSIE: That is all.

THE COURT: Any other questions?

REDIRECT EXAMINATION

[290] BY MR. SHULTS:

Q Mr. Flacavento, on the days that you witnessed the arrests were there people outside the union arrested in those mass arrests to your knowledge?

A Were there—

Q Were there people who were not union members arrested?

A Yes, on some days.

Q Do you know who those individuals were?

A Well, I know some of the individuals who were arrested on Friday, May 12, yes, who were not union people.

* * * *

LA FORCE—DIRECT

[306] Q Now did anyone from the union order you to sit in the road?

A No, I did it on my own because Pittston, they broke the law. They took my health card from me. I deserve it and that is the reason I done it. I am protesting in that.

Q Did anyone from the union force you to sit in the road?

A No. I did that on my own.

Q You are a widow. Do you receive any type of strike benefits?

A No.

* * * *

TATE—DIRECT

[314] Q Have you received any instructions at the picket line as to conduct or behavior on the picket line?

A I have been admonished on several occasions as [315] to no violence, no alcoholic beverages and no weapons.

Q You say admonished. You didn't have weapons on the picket line, did you?

A I have never seen any, and never seen any evidence of alcoholic beverages.

Q Were you told this on more than one occasion?

A Yes, sir.

Q Do you remember the people who were telling you these things?

A Most of it came down the line from my fellow picketers.

Q During the course of this strike have you been arrested?

A Yes, I have.

Q Do you remember the approximate week or date?

A I believe it was April 24. I am not absolutely certain but I believe that was the date.

Q What were you arrested for, sir?

A Blocking free passage of others, I believe the arresting warrant stated.

Q What were you doing?

A Sitting in the road at the entrance to the McClure No. 1 preparation plant.

Q Now when you sat in the road that day, you [316] realized there was a very real possibility you might be arrested?

A Yes, I did.

Q Were you aware of the injunction that had been entered by the court?

A Not at that time I wasn't.

Q Did you subsequently become aware of that?

A Yes, I did.

Q Did anyone from the union order you to sit in the road that day?

A No, sir.

Q Did anyone direct you to sit in the road?

A No.

Q Did anyone tell you you would lose your strike benefits if you didn't sit in the road?

A No, sir.

* * * *

SUTHERLAND—DIRECT

[348] Q Have you ever heard any union officials at the picket sites give any instructions as to behavior or peaceful [349] or violent behavior?

A Yes, they told us to go peaceful, not to use any vulgar language, to act like ladies and gentlemen.

Q Do you remember who told you this?

A Mr. Stump and Mr. Hudson.

Q Both Mr. Stump and Mr. Hudson?

A Uh-huh.

Q Was this on one occasion they told you?

A On several occasions.

Q Now the day that you were arrested for sitting in the road, did anyone from the union order you to sit in the road?

A No, sir.

Q Anyone from the union make you sit in the road?

A No, sir.

Q Did anyone from the union tell you that your husband would lose his strike benefits if you didn't sit in the road?

A No, sir.

* * * *

[1]

VIRGINIA:

CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

v.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants

Lebanon, Virginia
July 19, 1989

* * * *

BARR—CROSS

[75] Q Fine. The leaders were cooperative with you, were they not?

A Very, yes, sir.

Q There were times when they averted trouble, did they not?

A Continuously, yes, sir.

Q And there were times when they assisted you and your fellow state troopers in averting trouble, is that right?

A Continuously, yes, sir.

Q You had frequent and positive contact with them is that true?

A I did, yes, sir.

Q Just a moment.

Would you give me an example, Trooper, of how the leaders helped you or other troopers avert trouble.

A If we had any problem with the picketers such as, and at times the crowds would begin to swell out into

the edge of the road as to where they placed themselves in position that they could have impeded traffic, if we had problems with any individual in the heckling of people from [76] our department or we had anybody becoming a little too rowdy in their verbal manner towards company representatives or employees, I would not or I did not have a member of my department to approach those individuals. I would contact one of the strike leaders, make him aware of the problem and he would take care of it. The problem would be eliminated at that point in time.

Q Were there times, can you give us an example of how they assisted troopers in averting trouble?

A In the same manner. That is what I am referring to. If a trooper had a problem with any of the miners doing anything out of the way, the trooper could approach me, I would go to one of the leaders and the problem would be eliminated.

* * * *

CONNOR—DIRECT

[180] Q From where to where?

A Laurel Mountain to Moss 3 prep plant.

Q How far is that?

A Approximately two and a half to three miles.

Q How long have you been doing that?

A Since October or November.

Q Of last year?

A Yes, sir.

Q Do you recall an event on June 12 during one of your trips?

A Yes, sir.

Q Tell the Court what happened on that day.

A There was a wreck approximately, I would say a mile and a half above Moss 3 prep plant, between a coal truck and a car. Traffic came to a standstill. Traffic was excessively heavy. There was approximately 30 men or

so dressed in camouflage, gathered around my truck. There was no way I could turn around to get out. I tried to holler on my CB and get me a trooper and they tore my cable axis that goes in the bottom of my CB antenna, they pulled them loose to where I couldn't holler for no trooper. They bent my mirrors in, cut the brake lines on my trailer, ripped the wiring out of the back of my trailer. Pretty much destroyed my trailer there. Cost me two or three hours downtime.

[181] Q Did you simply drive away from this or not?

A Well, I was able to drive away, but it had to be repaired as quick as I got to the mine. I drug my trailer pretty much, my brakes were about to lock up where the air lines were cut. I was able to get it to the mine, which you know was half a mile or so.

Q While this was going on, could you leave then, is what I am asking.

A No, sir.

Q Why not?

A Well, they was, like I said, 35 men or so just daring me to get out of my truck.

Q Could you maneuver the vehicle around the traffic?

A No, there was just too much traffic, cars in front of me and cars behind me, no way I could turn around.

Q What were these people saying to you?

A They were just cursing me, daring me to get out of the truck, said come on out there and we would fight.

Q About six days later did you suffer another event?

A I had a rather large rock thrown through the windshield of my truck.

Q Where did that happen?

[182] A Approximately a half a mile above Laurel Mountain.

Q Was that on your regular coal route?

A Yes, sir.

Q Describe to the Court what happened that time.

A I went up the road from the point where the incident took place for me to go up and load and come

back down that would take approximately 10 of 15 minutes. When I went up, there was no vehicles—when I come back down I would say there was approximately 15 to 20 men in a wide spot at the bottom of the hill. I had two cars running approximately about 10 miles an hour in front of me, and when I got to the bottom of the hill, I was rocked excessively hard, had a rather large rock stick in my windshield.

* * * *

KILGORE—DIRECT

[228] Q You don't send your bills to your individual criminal clients?

A That is correct.

Q Who do you send them to?

A There is a criminal or legal defense fund and it is called Pittston Miners for Justice or Pittston Against Miners, or something. I have only sent two bills.

Q What is their address?

A I sent it in care of Mr. Stroop and he forwards it on to the legal defense.

Q Mr. Stroop is the general counsel of the United [229] Mine Workers of America?

A Yes.

* * * *

JUSTICE—REDIRECT

[269] Q You say they were scattered out a half mile down the road?

A Yes.

Q How do you know the people you think threw the [270] rock? Do you have any reason to believe, based on what you know, that they came from the picket shack area?

A Well, as the rock bounced off my truck, there was three guys standing behind the vehicle. When I looked to see them, they ducked and hid.

Q Do you have any other basis for believing that those people, those three people came from the picket shack area, other than what you just said?

A Well, I would assume, they was dressed in camouflage as was everybody else.

Q Other than the camouflage?

A They were just sitting around the vehicles, these people were.

* * * *

STUMP—DIRECT

[340] THE COURT: Are you aware of any local unions, any activity by any local unions or any member—I mean any persons of authority in local unions taking any steps to try to accomplish this?

THE WITNESS: The only thing I could say on that, your Honor, I know our people at the local are trying to watch and keep up with everything at their picket sites that stays within the jurisdiction of our order, and I guess the Federal Court order, trying to make everything, you know, stay within what the guidelines are set out.

I know that they are doing that. I have heard them, that I done when I checked the picket lines.

I have asked them have there been any problems anything going on. You know, a lot of times maybe some people have stopped by and they have told them "We can only have so many people here, you know, we are sorry, you will have to leave," or something or other like that. I know that they have been doing that.

THE COURT: As far as this Court is aware of the testimony that there have been a lot of UMWA members who have come to Virginia from other places [341] in sympathy for your brothers who are on strike here against Pittston in Virginia, and, of course, in West Virginia and Kentucky. There has been a lot of testimony about these rolling blockades or caravans or whatever they want to call them. You profess not to have any personal knowledge about these. Are you aware of any information that

has been sent out by the International to try to keep these people from blocking the road or impeding traffic in a way that has obviously occurred?

THE WITNESS: The only thing I can say to that, your Honor, is that I am aware that the top three line officers in a telephone conversation with the International executive board had instructed all the people to go back to work, throughout, everybody that was out.

* * * *

BARTEE—DIRECT

[345] Q Have you leased that property to the mine workers or some organization to conduct some activity up there in the last few weeks?

A I leased it to Local 1259, yes.

* * * *

[348] Q When you leased this thing, did a bunch of people roll in out of state, United Mine Workers members?

[349] A Yes, on Sunday.

Q Sunday of what, what day?

A That would have been the twentieth, I guess.

Q Did you know they were coming?

A Not until, I knew that it was going to be set up as a camp but I didn't know who was coming.

Q How did you find out? I guess you had 700 people there at the time, have you not?

A Yes.

Q How many people have you had there at the highest number?

A I would say a thousand.

* * * *

[353] Q Have there been any caravans, long lines of cars that have been organized out there to go out and drive along the road at low speed?

A They take them out every day. There is tour captain that takes them out.

Q A tour captain?

A Yes.

* * * *

McCAMEY—DIRECT

[366] Q Are you Don McCamey?

A Yes.

Q Are you an official with United Mine Workers?

A Yes.

Q What is your position?

A Secretary-Treasurer of District 28.

[367] Q That is an elective position, I understand.

A Yes.

Q How long have you held that office?

A Since June 1 of '87.

Q Have you played any part in assisting United Mine Workers members and their associates who have been arrested with strike activity?

A The only thing I have done in that line I guess is to bond some of them out.

* * * *

Was it the union which was helping on their bond or was it you as an individual?

[368] A We put up the property of the District.

Q When you say "we" District 28 of the United Mine Workers?

A I acted on behalf of them.

THE COURT: I can't hear you.

THE WITNESS: I said I acted on behalf of the District.

BY MR. HODGES:

Q Who approved that activity?

A The official board.

* * * *

[376] THE COURT: Mr. McCamey, are you aware of any of the District 28 funds being used to fund this Justice for Pittston Miners organization?

[377] THE WITNESS: No, sir.

THE COURT: Are you the person who would write the checks?

THE WITNESS: Yes, sir.

THE COURT: Have you written any checks or authorized anyone to draft any checks as donations for this group?

THE WITNESS: No, sir.

THE COURT: Are you aware of any, whether or not any of District 28 or any of the locals with whom you might have knowledge of has contributed funds to the operation of the Camp Solidarity?

THE WITNESS: No, sir, I don't know anything about that.

THE COURT: Has District 28 paid any monies toward the lease of property on which that camp is located?

THE WITNESS: No, sir.

THE COURT: Has District 28 funded any of the purchase of food that supplies that?

THE WITNESS: No.

* * * *

UMWA SELECTIVE STRIKE ASSISTANCE PROGRAM

REVISED 10/87

1. Selective Strike assistance shall be distributed in accordance with the UMWA International Constitution and the rules and regulations approved by the International Executive Board. The Selective Strike Assistance Program is designed to promote the selective strike strategy.
2. The Selective Strike Assistance Program shall be administered by the UMWA International Secretary-Treasurer in cooperation with the International Strike Office.
3. Strike Assistance shall be available, UPON APPLICATION, to all working members in the affected operation and local who are in good standing before a strike begins and who participate in the strike under the rules established by the International Union. Payment of strike assistance is also subject to the condition that the recipient shall observe the selective strike during its entire duration.
4. Members must be in good standing for at least four (4) months BEFORE A STRIKE BEGINS to be entitled to strike assistance without penalty, provided they meet the other qualifications.
5. A member in good standing is one who is not IN ARREARS IN DUES, INCLUDING ASSESSMENTS, AS PROVIDED IN ARTICLE 13, SECTION 10 of the UMWA International Constitution.
6. Any member who owes a selective strike assessment, reinstatement fee, back dues, or a fine shall not be considered to be in good standing and is not entitled to strike assistance.

7. Any member who undermines the selective strike strategy by going to work in a non-union mine or other non-union company within the jurisdiction of the International Constitution shall be terminated from the selective strike program for the duration of the current selective strike. Anyone who was a recipient of strike assistance and returns to work during that selective strike shall owe the International Union reimbursement of all strike assistance previously paid him/her during that strike (including medical costs).

STRIKE PENALTY FOR DELINQUENT MEMBERS

8. A member who is or becomes delinquent in their dues, including assessments, (except in those cases wherein the delinquency was not the fault of the member) and later acquires good standing membership by paying their back dues, including assessments, at any time during the four (4) month period prior to the strike, shall be penalized two (2) weeks' strike benefits for their delinquency.

(A) For each week during a strike a member waits to put himself/herself in good standing, he/she loses another week of strike benefits (in addition to the initial two week penalty) as a penalty for failure to become a member in good standing. For example, if he/she waits 4 weeks into the strike to pay back dues, he/she must wait an additional 6 weeks thereafter, (2 weeks initial penalty plus 4 weeks) until he/she is eligible for benefits.

(B) Any member who pays his/her back dues, including assessments, and/or a reinstatement fee at least four (4) months prior to a strike taking place by his/her Local Union, shall be considered in good standing, and shall not be penalized for his/her past delinquency.

- (C) For each week a member does not report for assignment to strike activity or fails to participate in an assigned activity, he loses a week's benefit in addition to the benefit for the week in which the activity was not performed.
- (D) In the event a Union representative knowingly issues a Selective Strike check to a member who is not entitled to receive a check, they will jointly be responsible for repaying a like amount to the Selective Strike Fund in addition to any other penalties.

NEW HIRES

9. New hires may become eligible for strike benefits only if they join the Union by paying the initiation fee and current month's dues, including assessments, prior to the strike taking place. In the event a worker has made out and signed an application for membership and a Union checkoff card that has been forwarded to the company prior to the strike taking place, he/she would be considered a member in good standing and would be entitled to strike assistance.

MUST BE ON ACTIVE PAYROLL

10. Only members of the Local Union on strike who were on the ACTIVE PAYROLL at the time the strike began, (or those who are denied unemployment compensation as a result of the strike) shall be entitled to strike assistance. Members who are sick prior to a strike and are drawing sick benefits or workers' compensation during the strike are not eligible to draw strike assistance. Special cases shall be responded to in accordance with Article 19, of the UMWA Constitution.

MUST PARTICIPATE

11. You must **PARTICIPATE** in authorized lawful strike activity assigned to you by your Union representative.¹ Your selective strike assignment is not a job but, rather, a responsibility you undertake for the benefit of your union brothers and sisters. Participation in the strike may include services on the selective strike committee, authorized strike activity at your mine, strike information classes, soliciting committee, or lectures or other appropriate lawful activities established by your Union. **SELECTIVE STRIKE MEETINGS AND AUTHORIZED STRIKE ACTIVITY ASSIGNMENTS ARE MANDATORY.**

MUST REGISTER

12. You must **REGISTER** and make application for strike benefits on the day assigned to you by your Union representative. In the event a selective strike is authorized at your operation, each member, regardless of status (inactive or active) must contact his Local Union Selective Strike Committee within thirty (30) days after the strike begins to determine his eligibility for strike assistance. Failure to do so will result in that individual's disqualification.

BENEFIT CHECK PAYMENT DAY

13. You must pick up your strike benefit check on the specific day assigned to you by your Union representative.

¹ NOTE: Only the International President has the authority to call a strike or to pick the targets of a selective strike. A local union or district may not call a strike or authorize picketing related to a strike at any location unless it has been given express authority by the President. A MEMBER WHO ENGAGES IN UNAUTHORIZED PICKETING OR ANY OTHER UNAUTHORIZED STRIKE-RELATED ACTIVITY CAN LOSE HIS ENTITLEMENT TO STRIKE BENEFITS.

YOU ARE NOT ENTITLED TO SELECTIVE STRIKE BENEFITS

14. If you are unemployed.
15. If you are drawing sick and accident benefits.
16. If you are drawing Workers' Compensation benefits.

DURATION OF ASSISTANCE

17. A member shall accumulate selective strike assistance credits beginning with the first day of the strike. For each day's pay missed due to the strike, Monday through Friday, a member shall receive one day's strike benefits at the prorated daily amount.
18. Strike assistance shall be made available to the member beginning on or about the 15th day of the strike.

SCHEDULE OF BENEFITS

19. Strike benefits are paid on a bi-weekly basis.
20. **STRIKING MEMBERS WILL RECEIVE \$—— PER DAY FOR EACH DAY THAT THEY ARE ON STRIKE BEGINNING WITH THE FIRST DAY OF THE STRIKE MONDAY THROUGH FRIDAY.**
21. Strike assistance will remain at a constant level as long as adequate funds are available.

INSURANCE BENEFIT

22. **THE INTERNATIONAL UNION, FROM ITS STRIKE FUND, WILL PAY GROUP MEDICAL-HOSPITAL INSURANCE PREMIUMS FOR STRIKING MEMBERS WHO PARTICIPATE IN THE AUTHORIZED STRIKE ACTIVITY ASSIGNED TO THEM BY THE UNION REPRESENTATIVE.**

STRIKE RECORDS

23. All procedural records will be furnished by the International Union and must be used in the expenditure of all strike funds.

* * * *

Question 7: Do I have to participate?

Answer: Yes. You must do whatever strike duty is assigned to you.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

vs.

INTERNATIONAL UNION, UMWA, *et al.*,
Defendants

July 20, 1989

Lebanon, Virginia

BEFORE THE HONORABLE DONALD MCGOHLIN, JR.

* * * *

DESKINS—DIRECT

[109] BY MR. MASSIE:

Q Would you state your name, please.

A Joyce Ann Deskins.

Q Where do you live?

A Council, Virginia.

Q Are you employed outside the house?

A No.

Q Is your husband employed, ma'am?

A Yes, at Lambert Fork.

Q How long has he worked at Lambert Fork?

A About three, two and a half to three months.

Q Were you involved in an incident between two automobiles in Lebanon in June of 1989?

A Yes.

Q Would you tell the Court what happened.

* * * *

So before I got out to Revco at the top of the [110] hill out here at Monk Supply I seen a black car coming, and it was going from side to side. All at once the driver's hand went up. I don't know if he was shaking his fist or throwing me a finger or what. Then it was like the whole car, you know, there was a whole bunch of men. I do know the man that was sitting behind the driver's seat in the backseat, he had this much of his body hung out of the car window.

THE COURT: I can't see where you are indicating.

THE WITNESS: From her up.

THE COURT: Indicating from your waist?

THE WITNESS: Yes.

A And he hollered scab at me. I seen, you know, that he was going to hit me so—well I really panicked and I cut my wheels to the right. I had done gotten off of my side of the road. Well, the front wheel got off to the side of the road, and he got the front end of my car with his car. I just stopped my car there, and I looked back and they were still hollering. They called me a name, you know, a bad name.

Q All right. How were these people dressed?

A They had camouflage, green clothes on and hats. I don't know if the man that was driving had a hat on, but the man that stuck his body, his head out the car window, he [111] had a hat on.

Q Were you on your side of the highway when this happened?

A Uh-huh.

Q How far?

A I was all the way on my side and I went all the way off my side onto the parking lot to keep them from hitting me straight in the front.

Q And there was an impact between the two vehicles?

A Sir?

Q Was there a collision between the two vehicles?

A His car hit the front end of my car.

Q What did his car do after that?

A He just took off up that hill.

Q Had you had any warning that this would happen to you?

* * * *

[114] A I got a phone call and this man told me if I come to Lebanon, that they would get me, that they had tried to warn my husband to quit his job; and if I come, they would get me.

Q Did you report this to the police, this car incident?

A Yes. I pulled over at Monk Supply. I was scared to death. I was crying. I didn't know what to do. I was afraid that the men would come back, because they had told me they were going to get me, and it was a carload of men.

I got out of my car. I looked at what had happened. I got back into my car and drove to the Carriage House, because the people behind the man in a black car that hit me, I was screaming for them to stop. They wouldn't stop. They waved and blowed and kept on going behind the car that had the picketers. The people behind me didn't stop, and I was afraid that those men would come back to where I was at and do something to me, because they had threatened me before. So I went to the Carriage House, and there was a State Police named—

* * * *

ADAMS—DIRECT

[157] Q Mr. Adams, do you have an overall responsibility for the total operation of these trucks in these two counties, Dickenson and Russell Counties, Virginia?

A Yes, sir, I do.

Q Can you tell the Court at least approximately how many punctured tires your trucks have had after May 17th up to the present?

A Okay. I had this a little bit different, but I can give you approximately. We have had within twenty to twenty-six hundred flats, pictures in the tires.

Q That would be from May 17th up to the present?

A Up to yesterday.

Q Have you had any broken windows or windshields also after May 17th?

A I really from my notes can't determine that because I had this information from day one of the strike. I really don't have it broken down to month and day.

Q All right, but have you had some broken [158] windshields since May 17th?

A For sure I have lost three windshields in a couple of pickups. In coal trucks I have a different file, and I think we have lost four since that day.

Q Do the coal trucks have any protective device on their windows?

A Yes, sir. We installed Lexan on our trucks to make it quite difficult to break the windshields out, and that seems to have curtailed it quite a bit.

Q Is Lexshield some kind of plastic material?

A Yes, it is. It is a high impact plastic. It is about 350 times stronger than glass.

Q And you have fourteen trucks; is that right, sir?

A Yes, sir, that is correct.

Q Are there other trucks from other companies that are running other Clinchfield operations? Do you know that? Are you hauling all the coal for Clinchfield these days?

A No, sir, I am not. There are other companies that haul coal.

Q And you are hauling from two mines into Moss 3?

A Well at the present time we are servicing or assisting servicing at Yowling Branch, Laurel Mountain and the Lambert Fork Mine at the present time.

* * * *

VICKERS—DIRECT

[160] Q Mr. Vickers, are you employed by Clinchfield?

A By Pittston.

Q By Pittston, all right. What is your job, sir?

A My title is a buyer.

Q What do you really do? What is your daily work?

A During this strike I purchase parts and accessories for coal trucks to keep the coal trucks running.

Q Do you work at the Central Shop?

A Yes, sir.

Q Do you supervise or see the activities that are involved in the repairing of coal trucks and tires?

A Yes, sir.

Q Can you tell the Court at least approximately how many tires have been repaired there at the shop from May 17th up to the present or to a recent date?

A Yes, sir. According to our figures here that we have tallied, beginning with that week ending May 21 through the week ending 7-16, we have replaced 671 tires. That is tires put on. That doesn't count plugs.

[161] Q All right. Tell the Court the difference between replacing and plugging.

A Okay. These 671 are tires that had to be taken off. They were damaged to the point we just couldn't plug them. They had to be removed.

We have had approximately—we didn't have an exact figure on the plugs, but a good estimate would be about 500 plugs.

Q Now do your figures, the six-hundred figure, does that include tires that went down and were repaired on the night shift?

A No, sir. This is just the day shift activity.

Q Do you know whether any tires have been repaired on the night shift?

A Yes, sir. We have about thirty trucks that stay at the operation after the day shift ends; and what they do at night, they try to get these trucks ready for the next morning. There will be some nights that there will be anywhere from ten to twenty tires that they will have to change to have the trucks ready to roll. The tires went down between 7:00 that night after they parked them and the next morning, and there was no record kept of those.

Q And do your numbers include any tires that are repaired over at the McClure facility?

A No, sir.

[162] Q They have a separate tire-repair facility over there?

A Yes, sir.

Q You don't know what their numbers are, I guess?

A I have talked to—

Q Well that is all right. You don't supervise that over there, but do you know whether there is a separate tire-repair facility at McClure?

A Yes, sir.

Q Now do you know how many windshields and other windows have been replaced on coal trucks from May 17th?

A We have replaced 71 windshields.

Q How about other windows?

A No, sir. This is just truck windshields.

Q Does that include light trucks or just coal trucks only?

A This is coal trucks only.

Q Have you had to replace any radiators from damage, being punctured during the strike?

A Yes, sir.

Q How many have you done?

A For this time period there are 19.

* * * *

SANDERS—DIRECT

[225] Q Are you Sam Sanders?

A Yes, sir.

Q Are you the superintendent of the Moss 3 Preparation Plant?

[226] A Yes, sir.

Q Mr. Sanders, do you remember what you and your family were doing on the weekend of May 19th of this year?

A Yes, sir, I do.

Q What were you doing?

A On the 19th at approximately 7:00 p.m. my wife and my children and I left our home. I took my four children—they stayed in Kingsport, Tennessee with my sister. My wife and I spent the weekend and went to Luray, Virginia and stayed away from home.

Q When did you return home?

A Approximately 7:00 p.m. on the 21st.

Q Did you have your children with you when you came home?

A Yes. I picked them up on the way back.

Q Are your children a boy and three girls? Do I remember that?

A That is correct.

Q And what are the ages of your children?

A My boy is four years old, and my youngest girl at the time was eight, and a girl ten and a girl thirteen.

Q As you approached your house, was it after dark?

A No, it was not.

Q Did you find anything unusual around your [227] house?

A Yes. Immediately as I came on the level of the driveway approaching the house, I saw a piece of card-

board on the front doorknob. And evidently my wife saw it about the same time I did, because she looked at me and she said, "They put something on our door."

Q Let me show you Plaintiff's Exhibit 39 and ask you if you know what that is.

A Yes, sir, I do.

Q What is it?

A This is what was on the doorknob of my kitchen door when I returned the 21st at 7:00 p.m..

Q Would you read the verbage there to the Court, please.

A UWMA, we have got your number, wife and four kids. 788-8390. Don't work, question mark, explanation or something.

Q Is 738-8390 your phone number?

A Yes, it is.

Q Are three of your children old enough to read?

A Yes, they are.

Q Did they see this sign?

A Yes, they did see it.

Q Did they read it?

A Yes, they sure did.

* * * *

[228] A My wife and my four children, I think, have all [229] been more apprehensive since this date, since we returned. I have one girl, which is ten years old, and it just so happened on the Thursday, the 18th, previous to this weekend, she had left the house that morning about 7:40 a.m., and my three girls were going to catch the school bus that morning. They have to walk about 800 feet on the driveway. It is gravel. As they left the house down the hill on the driveway about approximately 150 feet, she stepped on the edge of a jackrock. They looked, and it just so happened she had tennis shoes on. If she had stepped over just a little bit further, maybe two or three inches, it would have gone through her foot. There is no doubt in my mind. There were four jack-rocks in the driveway.

This same girl, she has had problems since then at night. She wakes frequently at night. She is scared. She is afraid. She is hollering for her dad, me, or my wife sometimes numerous times during the night and as recently as this morning at 4:45 a.m..

* * * *

Q Mr. Sanders, how long were you and your wife and family away that weekend?

A Approximately 48 hours.

[230] Q And with the exception of the fact that the piece of cardboard that you just identified as an exhibit a minute ago, with the exception of the fact it has the letters UMWA on it, do you have any other thing that links it to the United Mine Workers?

A Only the note and a neighbor said she saw two men Sunday morning—

MR. VERGARA: Objection to the hearsay, Your Honor.

THE COURT: You asked him what he had to link it. Go ahead.

A A neighbor that lives across the state highway from me saw two men Sunday morning, she said, at approximately 10:30 a.m.. One was in a red pickup. The other she thought was returning to the pickup down my driveway, and he had a paper bag over his head. She could not identify either man.

Q Do you have anything else of your personal knowledge?

A You are asking my personal knowledge. There were two men in camouflage that my wife saw earlier.

Q I am asking of your personal knowledge.

A Only what my wife saw.

* * * *

CRICKMER—DIRECT

[296] Q Tell the judge about what that was and how it happened and about when it was.

A On the state court hearing I think around the 16th of May, a day or two after that, I was in the Moss 3 scale house there. There was a large group, two or three hundred estimated across the street at the entrance to the raw coal pile. Mr. Hudson was on the bullhorn talking to the crowd about various things.

Q Excuse me. Is that Marty Hudson?

A Yes, sir, Marty Hudson. He was talking to them about various activities, I assume. I just so happened to start listening more intently, I guess. I heard him calling out this as the trucks pulled in and caught us offguard. He would call a man's name, and every witness we had had in state court in the day or two before, Vance Security and State Transport drivers, I noticed he would call them out by name. He would say—there was one phrase that was—let me think one second. He said, "We know who you are." Then he would pause a minute and he would say, he would turn to the crowd and I watched. I was right there. He would say, "And we don't believe in violence, do we?" and they all laughed and jeered. And these people were stopping their trucks right there amongst two hundred people. He did that many times in a period of time.

* * * *

DIRECT—HARTSOCK

[11] Q Now, can you tell the court what happened when you went up there?

A Well, I, when I got to the area, there were several cars and trucks in line, pickup trucks and cars. I drove up to the picket shack, and I was going to stop for a minute and visit with them, and they was a string of traffic a-coming meeting me, and I was going to turn in, but there was so much traffic I seen I couldn't get in, so

I just eased on up the road and was going to turn and come back down and stop.

Just as I passed the picket shack, a state trooper pulled me in, motioned me in and gave me a ticket for impeding traffic.

Q Okay. Now, were there any vehicles in front of you at that time?

A Yes, there were vehicles, they were, due to the fact that I was aiming to turn off, they was approximately a hundred yards ahead of me, there was a string of traffic, yes.

[12] Q A hundred yards a head of you?

A Yes, sir.

Q Were there any vehicles behind you?

A Yes, there was. There was some cars and Blazers and things of that nature.

Q Did you see any coal trucks behind you?

A No, sir, I did not.

Q Do you know approximately what speed you were traveling?

A Well, I don't know for sure. It would be a mere guess, you know, if I told you. I was just going slow, maybe fifteen mile an hour, something.

Q Now, had anyone asked you to come up on that particular day?

A No.

Q How did you decide on that particular day to go up into the area?

A I just decided that morning that we'd drive up through there.

Q Now, do you remember what you were wearing the day you were stopped?

A Yes, I do.

Q Can you tell the court?

A Well, I was wearing a pair of blue uniform [13] that I used to wear to work, pants and shirt.

Q Did it have any type of reference to UMWA?

A Yes, it did. It had a patch on here, said International Representative, United Mine Workers.

Q Now, at that time were you still an International Representative?

A No, sir.

Q Was this your uniform?

A Just an old work shirt that I worked in around the house, and I put it on.

* * * *

DIRECT—BALES

[29] Q Let me stop you one minute. What truck, what kind of truck was it?

A The car, it was a tandem, not a tandem but a trailer, tractor-trailer, and he was hauling coal.

Q Did he have, was there a name on the side of the truck?

A It was Valley Trucking.

Q Okay, go ahead.

A And we had pulled up to the intersection. We noticed the security guard was out there, Vance Security, and he had, he was out with his camera looking around the road and everything, and just as we pulled up the truck driver, Rodney Cox came out, and he just slung a jack rock right out in front of you.

Q Now, did you see the jack rock?

A We see'd the jack rock come out of his hand.

Q All right. Now, the man from Vance Security, where was he located in relation to Mr. Cox at this time?

[30] A Well, he probably about four feet away with his back turned to him.

Q All right. Do you think that the man from Vance saw Mr. Cox do this?

A I don't think he saw it, but I think that he knew it was being put down there.

MR. HODGES: I object, Your Honor.

THE COURT: Sustained.

Q (By Mr. Shults) All right. Now, Mr. Bales, what happened after that? What happened next?

A Well, he came down out of the truck, run around in front of the truck and just took the jack rock and threw it right out. We were no more than probably fourteen feet away.

Q Is there a picket shack there?

A There was a picket shack at the intersection, which was later moved.

Q Okay. Did the people at this, did you as a picketer or did the other people who were picketers, had they had any problems with jack rocks?

A Well, they had had problems. Myself, I had had problems because I had pulled up in front of the picket shack there one time to deliver food, the first thing I picked up was jack rocks in the front tire.

* * * *

DIRECT—VIARS

[41] Q (By Mr. Shults) Mr. Viars, did you ever have occasion to observe any jack-rocking activity regarding the Vance Security people?

A Yes, sir, I did.

Q All right. Now, I want you to be as specific as you can and tell the judge about the episodes that you witnessed.

A I witnessed it on two different occasions, they come down—

Q Do you remember when it was?

A This was in the last part of May and early [42] part, the first part of June.

Q All right.

A Vance Security come down before the police officers arrived that morning.

Q Did the troopers stay at your location all, all night?

A No, sir.

Q All right. During the day, what hours would they be there?

A They would show up anywhere from six to seven o'clock of the morning and stay to like nine and ten o'clock of a night. And then they would leave, just come back at different times, you know.

Q All right. Go ahead with your story.

A And right after daylight one morning it was something like six, six-thirty, I witnessed Vance Security come down, and they brought, it was seven or eight, something like that, and some of them had on their riot hoods and stuff like this, and they brought a camera down and placed jack rocks in front of our picket shack and took pictures of them, and it's two mud holes directly in front of it. They'd place one in the mud hole and take a picture of it, then move it over to another mud hole and take a picture, then move it over on the dry surface and take pictures.

[43] Then they'd take pictures of us a-standing there at our picket site.

Q Now, did that, was that, basically, the events on both occasions?

A Yes, sir, same events.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

vs.

INTERNATIONAL UNION, UMWA, *et al.*,
Defendants

TRANSCRIPT OF THE EVIDENCE INTRODUCED
AND PROCEEDINGS HAD upon the hearing in the
above-styled case in the Circuit Court of Russell County,
Virginia, on September 13, 1989; the Honorable Donald
A. McGlothlin, Judge of said Court presiding.

* * * *

TROOPER KVASNICKA—DIRECT

[53] Q Now, during this time of impeding traffic, did you observe any of the leaders of the International Union?

A Yes, sir.

Q Who and where did you observe these people?

A On the 10th I observed Mr. C.A. Phillips in the area. He was riding in a white Jeep pickup truck. I saw him parked at Route 600 and 621, at the Wilder Intersection, and again a little later on that day I saw him at Moss 3, parked alongside of the road. And on that day, also, I observed Jackie Stump and John Cox sitting stationary at Moss 3. That was around 3:30 in the afternoon.

Q Did you record any activity on July 11th?

A No, sir. There was little or no traffic in the Moss 3 area on the 11th.

Q What about on the 12th?

A Yes, sir. On the 12th, at approximately 10:15 a.m., [55] there was a large group, over 200 vehicles from out of state, Alabama, West Virginia, Pennsylvania and Ohio, came into the Moss 3 area and around 11:00 we started having impeding traffic and started making charges.

Q Did you observe any union leaders on that day?

A Yes, sir. I observed Mr. Phillips, C.A. Phillips, in the same white pickup ride by Moss 3 around 11:30 that morning. He came back again around 12:00. I saw him have a conversation with Mr. Blaylock. He left. About 12:40 I saw Marty Hudson at Moss 3. A little while later C.A. Phillips came back and around 1:00 or 1:30 they departed.

Q How long did the impeding go on that day?

A All day.

Q What was the activity on the 13th of July?

A The traffic was not as heavy as the day before. It was some impeding going on, but on the 13th we began to have large groups gather up and down Route 600, Route 621 and over on Route 601, and we had several incidents of rock throwing and quite a bit of jack rocks being thrown in the road.

* * * *

[71] Q I believe earlier in your testimony, you can correct me if I'm wrong, earlier in your testimony when you were describing some of these groups of people that were on the wide spots on the side of the road, you referred to them as pickets, was that correct?

A Yes, sir.

Q Is there anything in particular that made you conclude they were pickets?

A That's what we refer to them as. I mean, nobody came to me and told me they were pickets. I mean, that's just my [72] conclusion.

Q Because they had camouflage on?

A Yes, sir.

Q That was the sole connection you had to decide they were a picket?

A I suppose.

* * * *

TROOPER GUILLIAMS—DIRECT

[92] A (The witness continues.) On July the 25th, at approximately 10:00 a.m., I was at the Moss 3 scale house talking to a supervisor when I observed, looking to my left or toward the Carbo area, a long line of traffic, like a procession coming down the road. And these vehicles filed to the left off of State Route 615 and parked on the side of the road on either side of the entrance into the Moss 3 Preparation Plant. These vehicles were filled with people dressed in camouflage and blue jeans and other various clothing. Some of the pickup trucks had two or three people in them, some had as many as eight and ten. A group of about nineteen people moved over into the entrance, off of 615 into the entrance of Moss 3 Preparation Plant and sat down in the roadway, blocking coal trucks that were attempting to make a turn into that.

* * * *

[94] Q Was there any group of camouflage dressed individuals not in the road, blocking it?

A Yes, sir.

Q How many would you estimate in that group?

A I would estimate approximately seventy people to the left and to the right of the group seated in the roadway.

Q When did they arrive in reference to the time that the ones who sat down in the road arrived?

A Just within seconds. There was a line of vehicles with these people in them.

Q Was Mr. Cecil Roberts one of the ones arrested by you for blocking the entrance to Moss 3 on that date?

A Yes, he was.

* * * *

TROOPER JONES—DIRECT

[116] Q All right Were there any events involving a picketer the 19th of July?

A Yes, sir, there were.

Q And what were those events?

A At approximately 8:50 a.m., I was called to Route 600 about two miles from 621. About twenty picketers were out and several jack rocks were thrown under a truck causing a flat tire.

Q Did you take any action?

A Yes, sir. I declared an unlawful assembly and dispersed them.

Q Did you have any other events that day?

A Yes, sir. At approximately 8:58 a.m., we were going toward 600—or 621 on Route 600. We were approximately a mile away from it. We had to stop because of a situation in front of us. A truck had stopped. There were several jack rocks laying in the middle of the road. Approximately, twenty miners or twenty picketers were on the left side of the road. I witnessed a man run to the back of a pick-up truck. When he got to the back of the [117] pick-up truck, I was only about fifteen feet away from him in a car. He was watching a trooper on foot that was picking up jack rocks on the other side of the pick-up truck. He reached his hands into the jacket and started throwing jack rocks out of the jacket and onto the ground in front of me and the other trucks, trying—he was trying to get rid of the jack rocks before the trooper got there.

Q And how was he dressed?

A He was dressed in camouflage.

Q And how were the other people, at that location, dressed?

A They were all dressed in camouflage.

Q All right. Were there any other events that day, the 19th?

A Yes, sir. At 10:50 a.m., I declared an unlawful assembly because of jack rocks in the road on 600, about

a mile from 621. There was approximately twenty picketers.

Q All right. How were they dressed?

A All in camouflage.

Q Were there any other events that day?

A Yes, sir. At 11:50, another unlawful assembly that I declared on Route 600, about three miles from 621. This time there were seventy-five people. They were all dressed in camouflage. I did see the rocks. There were approximately fifteen jack rocks laying in the middle of [118] the road.

Q All right. Continue with any other events that day.

A Yes, sir. At 12:40 p.m., we were called to jack rocks the road on 621, approximately four miles from 600. There were approximately fifty picketers on the side of the road. One arrest was made for jack rocks in the back of a pick-up truck that were laying in open sight.

Q And how were those people dressed?

A All in camouflage.

Q Any other events that day?

A Yes, sir. At 1300, I declared an unlawful assembly on Route 621, a half mile north of 601. Thirty people were involved and jack rocks were thrown, but I didn't see jack rocks. The troopers picked them up off the road.

Q And was that all the events for the 19th that you have recollection of or a note on?

A Yes, sir.

Q Now, just to review this, Sgt. Jones, how many unlawful assemblies did you declare on that one day?

A Seven.

* * * *

[125] Q Now, were you also on duty on July 28th?

A Yes, sir, I was.

Q Did you see any picketing activity on that day?

[126] A Yes, sir. I was back at Moss 3 in Russell

County along 600 and 621. That day between 9:00 and 2:00 p.m., eleven windshields were broken on Route 621—excuse me, Route 600, the first four miles of 600 or 621 on up.

* * * *

Q Sgt. Jones, have you ever employed a metal detector in the course of your strike related duties?

A Yes, sir, I have.

Q What do you do with a metal detector?

A We search for jack rocks.

[127] Q Do you find any?

A Yes, sir.

Q Well, tell me what your mode of operation is when you employ a metal detector?

A We go to areas where the picketers are bunched up and we get out of the vehicles and get the metal detector out and go between their parked vehicles and behind the vehicles near where they are standing, and we use the metal detector around them.

Q Are you always successful in finding jack rocks when employing this technique?

A Yes, sir, a hundred percent of the time.

Q Do you find large numbers, small numbers?

A We found, approximately, twenty-five pounds yesterday.

Q Have you ever seen any staging of vehicles at the Cleveland ball park.

A Yes, sir, I have.

Q What have you observed at the Cleveland ball park?

A At certain times in the morning, vehicles come from every direction and congregate in the parking lot at the Cleveland ball park. We estimate, approximately, 125 to 175 vehicles daily. They hold a meeting inside the building down there for, approximately, fifteen to twenty minutes every morning and then they proceed out. Sometimes in large groups, sometimes a few at a time, and [128] they go in different directions.

Q And where are the principal places they go once they leave the ball park?

A Most of them, in my experience, have come to Moss 3, to Route 621 and 600.

Q All right. How about 616, Chaney Creek?

A Yes, sir. They go up there, too, but not quite as often as 621 and 600.

Q And after they deploy, as you have just indicated, shortly after that, do you begin to see jack rock incidents and rocking incidents?

A Yes, sir.

* * * *

TROOPER IVEY—DIRECT

[156] A In the morning, around 7:00 a.m. that morning, we have a man posted at the ball field in Cleveland monitoring activity there. Approximately, 200 pickets gathered at that location by the hour of 7:00 a.m. in the morning. Then we monitored their movement from the ball field up 615 to 621 and Route 600 in Russell County, just up from [157] the scales. People got out of their vehicles and lined the road.

* * * *

A We took a report. From 8:00 a.m. till 11:00 a.m. there were five unlawful assemblies called by Sgt. Martin and I was with him when he called those unlawful assemblies.

* * * *

[158] Q Did you observe any damages to vehicles that had come through these areas, in particular, coal trucks?

A I would observe the vehicles moving from the direction of the Prep Plant and either go up Route 600. I generally stayed right here. There's a large parking area, and be able to respond to either location, I generally stayed right here, so I was in a position to see most of the vehicles coming back from the mine. But I would

notice them coming from the Moss 3 plant, certain vehicles, and I'd note that windshields were in good shape. After they had went up and got loaded up at the mines and came back by my location, I'd notice numerous [159] vehicles had broken windshields.

* * * *

A Marty Hudson. He was at the location. Again, I was parked right here.

Q You're pointing—when you say here, that's the Wilder Intersection?

A That's the Wilder Intersection. I was parked here and Mr. Hudson was parked in a black Blazer with Virginia registration here on the shoulder with a group of five or six pickets.

Q Did you observe any—let me ask you first, were there any pickets up and down 600 and 621 that day?

A From August 24th, it was very similar to the situation I described on the 14th. Again, approximately, 200 vehicles gathered at the ball field and then they caravanned to that location.

[160] Q The same day Mr. Hudson also appeared?

A Yes, sir. That was August 24th.

Q Did you record any damages to vehicles the day Mr. Hudson was there?

A That particular day we took twenty-two State Police investigative reports on missiles thrown at vehicles with broken windshields. And that was between the hours of 8:00 a.m. to 11:00 a.m. This was done in a three-hour period.

* * * *

TROOPER CHILDRESS—DIRECT

[169] A Well, I noticed—I was responsible for Russell County on the late night shift. And I noticed that there was a meeting at the Cleveland ball field area comprising of approximately, 150 to 200 vehicles. So I brought that to the attention of the people I was super-

vising. And when the meeting broke up, the vehicles left the meeting area there at Cleveland and then came out into the Moss 3 complex area.

Q Did you see about how many vehicles there were?

A Somewhere in the neighborhood of about 150 or so vehicles.

Q And when they came to the Moss 3 area, what did they do?

A A large group of people collected there at the intersection right down from the Moss scales, which would be on 600—615. Anyhow, it's called the gravel pit area, right there. And there was a large group of about 100 to 125 people collected in that side of the intersection, across the road from where I was sitting. I was sitting at the Moss 3 scale complex over there in the parking lot observing the group of people that was across the road from me. There were a couple of other troopers that were stationed back behind me on the other side of the scale complex. There was another group that had also collected [170] on the opposite side of—let's see, I guess you'd call it 616 and 615, in between 616 and the other section of 616 that goes up over the mountain down towards the golf course. And, at the time, that I was sitting there at the scale house area, I was monitoring the CB traffic, and the traffic was describing—what the traffic was, was friendlies and unfriendlies that were coming from one area to another.

MR. SHULTS: Objection to hearsay, Your Honor.

THE COURT: The objection is overruled.

Q (Mr. Hodges continues.) All right. It was describing friendlies and unfriendlies?

A Yes, sir, it was describing friendlies, unfriendlies, and what was ascribed as zeroes. And after listening to the CB traffic for a period of time, I heard traffic saying that an unfriendly was between two zeros and coming towards a particular post number, which I don't remember the post number. However, at that time, I had called

some troopers to come and meet me and they were the only ones moving, at that particular point. And I knew which direction they were coming from. They were coming from the Laurel Mountain area down towards the scales, down Ruote 600. So, as the headlights approachd the rise, I cut my high beam headlights on the crowd that was collected across the road there from where I was sitting. [171] And, as the vehicles topped the rise, the first vehicle which was a marked State Police car went by. As the second vehicle, which was a civilian vehicle, came by, it was rocked and jack-rocked. And then the third vehicle, which was a State Police vehicle, came by. At the time that I observed the rocking incident, I then told the other units to come with me and we went over to the group where they were located. I attempted to keep sight of individuals who had thrown the rocks, but the individuals faded back into the crowd itself. As I mentioned, there was about 100—125 people there. So, at that point, an unlawful assembly was declared and the crowd dispersed without incident.

Q All right. And about what time of the night was that, sir?

A This would have been at 11:41 p.m.

Q Were there any other events that night before midnight?

A There were other events right about this same time, but there would be sporadic events. We would be called to a rock throwing incident at one place or another and I would dispatch a trooper to that particular location. Then I would hear traffic on the CB radio saying that a trooper or a zero was enroute down there and for the people to get away from the scene. And we didn't locate any other crowds around where other activities occurred.

* * * *

BANOVIC—DIRECT

[215] Q Are you John Banovic?

A John J. Banovic.

Q B-A-N-O-V-I-C?

A Yes, Sir.

Q And you're the Secretary/Treasurer of the United Mine Works of America?

A Yes, sir.

* * * *

[224] Q Has any union member ever suffered any financial sanction as a result of any strike misconduct from April 5th to the present, pertaining to the Pittston strike?

A Not to the best of my knowledge.

Q Has any miner suffered any other sanction other than a financial sanction through union disciplinary activities as a result of the strike that's going on against Pittston?

A Not that I'm aware of.

* * * *

[225] Q Camouflage is the official uniform of the Pittston strike, is it not, Mr. Banovic?

A It looks that way.

Q It looks that way. It's true. It doesn't just look that way, it's true, isn't it?

A Yes.

* * * *

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, VIRGINIA

CLINCHFIELD COAL COMPANY, INC.

vs.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA

APPEARANCES:

STEPHEN M. HODGES, ESQ., Abingdon, Virginia

WADE W. MASSIE, ESQ., Abingdon, Virginia

KARL K. KENDIG, ESQ., Lebanon, Virginia

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JAMES J. VERGARA, JR., ESQ., Hopewell, Virginia

Counsel for the Defendant

Hearing of September 14th, 1989

* * * *

SMITH—DIRECT

[103] Q Are you Hope Smith?

A Yes.

Q Are you married to an employee of Clinchfield Coal Company?

A Yes.

Q And did anything unusual happen to you on July 6th of this year?

A Yes.

[104] Q Will you tell the Judge what happened, please?

A I was walking back from the doctor's office to my apartment and two strikers in their car—Well, one was coming down the steps from my apartment. When they

passed me, I was verbally abused, cussed. When I got to my apartment, there was a note on the door.

Q Now, these people that passed you in your apartment, when they verbally abused you, did they threaten you in any way or say anything other than just cussing you?

A They told me that if my husband didn't quit working over there that I would be hurt.

Q You would be hurt?

A Yes.

MR. HODGES: Is our next exhibit No. 40?

THE COURT: 41, I believe.

Q Mrs. Smith, let me show you a copy of a document that I've marked as Plaintiff's Exhibit No. 41. Is that a copy of the paper that you found on your front door after you talked to this man or after he had talked to you?

A Yes, but there's a word missing.

Q All right. Was the word that's missing an obscenity that starts with F?

A Yes.

* * * *

HELBERT—DIRECT

[137] Q Are you Robert Helbert?

A Yes.

Q Are you employed by Clinchfield Coal Company?

A Yes, sir, I am.

Q How long have you worked for that company, Mr. Helbert?

A Approximately—I started in '72 so approximately—I've been laid off a time or two so I'd say twelve or thirteen years.

Q All right, sir. In early August of this year before you were injured, were you working at the Lambert Fork mine?

A Yes, sir.

Q And did you come under attack on the early [138] morning hours of August 17th?

A Yes, sir, I did.

Q At that time, were you trying to go from the Lambert Fork mine to your home which would have taken you through the Town of Cleveland?

A Yes, sir.

Q Now, about what time did you leave the mine that night?

A I left the mines at approximately 4:05.

Q All right. And did your route take you down what's called the Chaney Creek Road?

A Yes, sir.

Q Do you know what route number that is?

A No, sir, I don't.

Q As you went down the Chaney Creek Road, does it intersect with another road, Route 615 at the bottom of the mountain?

A Yes, sir.

Q Now, as you approached that intersection, Mr. Helbert, were you alone?

A Yes, sir.

Q What kind of vehicle were you driving?

A I have a Samari Suzuki.

Q Samari?

[139] A Yes, sir.

Q As you approached that intersection, what happened to you?

A As I approached the intersection, I noticed something in the road and I proceeded to slow down thinking it may be jackrocks or something. And as I started, I flipped my lights up on bright. I felt the tires go and flipped my lights up on bright and just saw rocks coming from everywhere.

Q Were there a lot of rocks at that time?

A Yes, sir.

Q And was your vehicle hit by some of the rocks?

A Yes, sir.

Q About how many times would you estimate it was hit?

A At that point?

Q Yes, sir.

A Possibly a hundred places.

Q Did you see any people?

A I saw people.

Q Could you tell anything about them? Could you see how they were dressed?

A Yes, sir. I'm sure I saw camouflage.

Q You're sure you saw camouflage?

[140] A Yes, sir.

Q About how many people did you see?

A Probably more than a hundred, a hundred and twenty-five.

Q Were they on both sides of the road?

A Yes, sir.

Q I take it you had one or more flat tires by the time you got to that intersection?

A Yes, sir.

Q Did you then make a left turn on 615?

A Yes, sir.

Q That would put you going down toward what we call the Carbo intersection?

A Yes.

Q And as you proceeded along that road, what happened to you?

A Well, there is some dumpsters up the road about a quarter of a mile on the left. From the time I left the intersection at Gravel Lick and Chaney Creek, rocks were sporadic up to that point where the dumpsters were at and then rocks came again there.

Q Did you see any people?

A Yes, sir.

Q About how many were there?

[141] A The only thing I can remember at that time was the parking area. The parking area was full there and there was people on both sides.

A Yes, sir.

Q Could you see how they were dressed?

A No.

Q About how many times was your vehicle struck when you went through that group?

A Possibly fifty or more.

Q Did you then proceed down to the Carbo intersection?

A Yes, sir.

Q You were going to take a right at that intersection?

A Yes, sir.

Q Were there any people in that vicinity?

A Yes, sir.

Q About how many were there?

A Twenty-five or more.

Q Did you come under a rock attack?

A Yes, Sir.

Q How many rocks hit your vehicle there?

A Several. Twenty plus. I'm not for sure. It was hit several times.

Q Could you see how those people were dressed?

[142] A No, sir.

Q You then made a right turn at the Carbo intersection?

A Right.

Q Did you have any more rockings after that?

A No, sir.

Q You had at least one and maybe more flat tires at that time?

A Both the front tires were flat.

Q Where did you finally get help, Mr. Helbert?

A I drove to the—There is a sewer plant just outside of Cleveland. I drove to there and saw a trooper sitting on the side of the road and I pulled in in front of him.

Q Mr. Helbert, in your years of working with the company, have you traveled these roads at night other times before this strike began?

A Yes, sir.

Q Did you ever see large groups of people out standing beside the road at night before the strike began?

A No.

Q Did you ever have anyone throw any rocks at you before this strike began?

A No, sir.

[143] Q Mr. Helbert, let me show you Exhibit 42 and ask you if you know what that shows?

A It's a picture of my vehicle.

Q Is that after your vehicle got through the events you've just described to this Court?

A Yes, sir.

Q Let me show you Exhibit 43 and ask you what that shows.

A That's a picture of the inside of my vehicle.

Q Have you inspected your vehicle sometime after you—Within the last couple of weeks, have you looked at your vehicle in detail?

A Yes, I have.

Q Did you find anything unusual in there other than the wreckage that we can see in these pictures?

A Up under the seat, I found a roller bearing approximately an inch and a half in diameter.

Q Like a ball bearing?

A Like but shaped about three inches long.

Q Mr. Helbert, were you injured in these attacks?

A Yes, I was.

Q Do you know which area you were in when you had your first injury?

A At the intersection at the golf course, at [144] the Chaney Creek Intersection.

Q What injury did you get at that location?

A I was hit in the face with a rock.

Q What injury did that cause you?

A A cut in the nose.

Q And after you went on down the road, did you have any more injuries?

A Yes, sir.

- Q Where did you receive your next injury?
 A At the Carbo intersection.
 Q What injury did you receive there?
 A A rock came through the window and hit my hand.
 Q Which window did it come through?
 A Left.
 Q Is that your left hand?
 A Yes, sir.
 Q Did it injure your left hand?
 A Yes, sir.
 Q What did it do?
 A It broke my little finger.
 Q Is your hand in still some sort of a brace or a device, two fingers of your left hand?
 A Yes, sir, and I have steel pins in my little finger.
 [145] Q Did you have to be hospitalized?
 A. Yes.
 Q How long were you in the hospital?
 A Two days.
 Q Are you still off from work recovering from these injuries?
 A Yes.

* * * *

CRICKMER—DIRECT

- [151] Q Have you noticed any distinct phases or changes in the general strike activity around the Moss 3 area since the strike began?
 A Well, yes, sir, it's gone through distinct phases.
 Q What was the first phase? What was happening during the first phase?
 A In April when the strike started, you had, you know, your pickets and Clinchfield employees primarily that were off on strike, very few outsiders, stay out here in picket shacks. A lot of jackrocking was taking place

and a few isolated incidents. The rocking, there was no definite pattern to it in April. Along toward mid April and the end of April, we started getting the sit down stage. They were blocking the entrances to the plant and various operations we've testified here in Court about. Lambert Fork was blocked, Laurel Mountain was blocked by groups of people sitting down. The hot spot, I guess you could say, was Moss 3 preparation plant. We had at first massive groups of a hundred or maybe more who decide to sit down and block. And then as arrests were taking [152] place, they tuned that down, say, to ten, twelve designated individuals or whatever to sit down. And this continued throughout May.

Q Did this sit down activity occur almost every working day?

A Just about every day.

Q During late April and May?

A Just about.

Q And did you ever observe any union leaders around supervising the sit downs?

A There were a lot of various union officials that were observed at the local areas from local presidents. About all your local presidents were there, district presidents, Jackie, the International figures, T. A. Phillips, Marty Hudson, John Cox. They were all present during this period. I guess the prominent figures were Jackie Stump and Marty Hudson. Marty was there a lot on the bullhorn and Jackie was there a lot on the bullhorn.

Q You say on the bullhorn?

A Yeah, they coordinated the activities primarily at the Moss—Moss 3 preparation plant, you have to imagine you have maybe five hundred or eight hundred people involved with the union on the strike in one area, thirty or forty troopers there. It was a staged event [153] daily, almost every day, sit downs. And then after the staging was over with, they would back up and go home.

Q Would they all go home at the same time when that day's sitdowns were over?

A Generally. Not completely, you know, not a hundred percent but generally they would have their lunch break. You've seen that if you're out at the strike. They have definite patterns they follow.

Q Now, what was about the largest crowd by estimation that you saw around the Moss 3 plant during the sit down phase?

A They estimate a thousand people at a time.

Q Now, did the sit down phase come to an abrupt end?

A Pretty abrupt there about the first part of June.

Q Was that right after we had a hearing in this Court?

A That's correct.

Q And was that one June 2nd that the hearing was held in this Court with this Judge?

A That's correct.

MR. HAVILAND: Objection to the leading.

THE COURT: Sustained.

[154] WITNESS: Well, actually the 3rd, 4th, around there, is where it just quit just about. You started the roving blockades. That was the next step.

Q Is this what you consider a separate phase then?

A The roving blockade is a definite second phase.

Q Tell me what happened during the roving blockades?

A The roving blockade went through a series of sub phases. The roving blockade started out first with generally local people just like their sit downs did. You had a few out of staters. The sit downs started with basic local people. They built up at the end they had masses of out of staters in the sit down phase. And the roving blockade did the same thing. It started out there the first part of

June with small groups of primarily local individuals, local people meaning people that had worked at Clinchfield prior to the strike. You had a few Westmoreland people, a few Island Creek, a few outsiders but not the strength it was built up to later on in June. Along about mid June, the 20th, 19th, around there, after another Court date in Federal Court—Well, it was actually after a rally is what it was. They jumped up to a large out of state faction in the roving blockade to the point that in this loop area at Moss 3 preparation plant, [155] in this area right here, a wide intersection, the Carbo intersection, was bumper to bumper traffic to the point that you couldn't even pull onto the highway. There would be times when people would be trying to pull on, myself included, onto the main highway there that you would be held up in the parking lot for thirty minutes at a time. This went on up to the first part of July, the second week in July.

* * * *

[157] Q During the rolling blockade phase, did you ever observe any union leaders taking part in it?

A Yes, sir.

Q Who did you see and what did they do?

A John Cox, International representative.

* * * *

BAKER—DIRECT

[209] Q Were you at any of those meetings?

A I was at all but two thus far.

Q How frequently are they held?

A They are held every Wednesday night at 7:00 o'clock.

Q Now, referring to the ones you've been to, have any instructions been given as to how these striking Pittston employees are to conduct themselves?

A At a number of them, and I can't say at every one but a number of them, there's been messages passed

through whoever was speaking. At times vice-president Roberts spoke, at times President Trumka spoke. There have been times where other labor leaders have come and spoke and other church affiliated people have come and spoke. And we continually stress at those particular functions the importance of maintaining a non-violent, a lawful, means to win this dispute.

* * * *

DURAY--DIRECT

[258] Q Mr. Duray, I'm going to hand you what's previously been marked as Defendant's Exhibit No. 3 and ask you to review that. Are you familiar with that document, Mr. Duray?

A Yes, I am.

Q And did you have any responsibilities in terms of the distribution of that document?

A Yes, I did. My department oversaw the printing [259] and the mailing of this letter.

Q And where was the letter printed?

A The letter was printed at Kelly Press in Landover, Maryland.

Q And what was the distribution number for that particular letter?

A It was approximately thirty-five hundred.

Q And who was the letter sent to?

A The letter was sent to the membership, I believe excluding pensioners, of the Pittston locals which were called out on selective strike on April 5th.

Q Now, Mr. Duray, are you aware that Judge McGlothlin's order of July 27th, confirmed by his subsequent order of August the 17th, contained a provision regarding distribution for his orders to every member of the United Mine Workers?

A Yes, I am.

Q Did you have any part to play with regard to carrying out that order?

A Yes. Again, I oversaw the printing and the mailing of that order to our entire membership in the United States and Canada.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiff

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendant

HEARING

The following hearing was taken on September 18, 1989 at 9:00 a.m., in the Circuit Court of Russell County with The Honorable Donald McGlothlin, Jr.

PRESENT:

KARL K. KINDIG, Esquire
WADE MASSIE, Esquire
STEVEN M. HODGES, Esquire
Counsels for Plaintiff

WILLIAM O. SHULTS, Esquire
JAMES M. HAVILAND, Esquire
Counsels for Defendant

BLACKBURN—DIRECT

[16] Q What happened when you were trying to come back to work?

A I was coming up Frying Pan Mountain and met a truck and he shot, it was four or five rounds into my Jeep.

Q Four or five rounds from a firearm?

A Yes, sir.

Q Where did he shoot them, Mr. Blackburn?

A One went threw the windshield and hit the hood and the fender and the side of the dash.

Q Did he put a whole in your windshield?

A Yes, sir, he did.

Q Did you get a look at him?

A I got a look at him but, I didn't, I couldn't really identify him.

Q Could you tell The Court very generally what you did see as far as his appearance?

A White beard.

Q Had you taken any action against a person with a white beard just before that in court?

A Yes, sir. Friday morning I had a guy arrested on, for throwing rocks. He had a white beard.

[17] Q And, do you know what kind of vehicle this was that the fellow shot from?

A No, I couldn't tell if it was a Ford or a Chevrolet but, it was a truck.

Q Let me show you Plaintiff's Exhibit Number 2 and ask you if you can identify that?

A Yes, that's the hole in my windshield of my Jeep and the fenders and stuff where they rocked it and the hood.

Q Now, you say you got shoot on one occasion. You testified about being rocked going home earlier in that weekend?

A Yes.

Q Does this picture show any of the damage you got from the rock attack?

A Yes, sir.

Q Where are they?

A The hole in the window here on this side, the hood, the fenders.

Q And, how about the, is there a bullet hole in your windshield in this picture?

A Yes, right over top of the steering wheel.

Q And, were there other bullets that went into your vehicle on that occasion?

- A Yes, sir, there was three more.
- [18] Q And, what month was that in?
- A To be honest, I don't remember.
- Q Was it in either the months of July or August?
- A I believe it was in August.
- Q If it was in August, was it early in August?
- A Yes.
- Q Did you actually see this gun?
- A You could tell it was a handgun.
- Q Did you see it yourself?
- A Yes, when it come, he just stuck it out the passenger, the driver's side of the window.
- Q Now, shortly after that event, did you have any other invents involving shooting?
- A Yes, sir, I did.
- Q How soon after that did you next have a shooting incident?
- A It was the next morning.
- Q The next morning? What happened then?
- A I was coming down the road in my coal truck and it was, I met a red S-10, had two pickets in it dressed in camouflage.
- Q A little louder, please, we can't hear what you're saying.
- A The next, it was Monday morning, I was coming back down the road empty in my coal truck, I meet a red S [19] 10, there was two guys in camouflage in it. The one in the passenger side stuck a handgun over the cab of the truck and shoot into my windshield of my coal truck.
- Q I'm going to show you Plaintiff's Exhibit 3, 4, and 5 and ask you if you can identify those pictures?
- A Yes, sir, that is the bullet hole in the windshield of the truck.
- Q All right, what do the other two show?
- A It shows the truck sitting there with the bullet hole in it and the other one shows the bullet hole over the steering wheel of my truck.

- Q Now, sir, do you remember an event on August 9th at the Skeens Fork intersection involving rocking?
- A Yes, sir, I do.
- Q What happened there on that day?
- A That was the day that they had that last sit out on us and all the Troopers was down here at Moss 3, I was coming from Barton Mining and I got there at the intersection and there was about, I'd say 75 pickets there and they all was throwing rocks at us.
- Q And, did they hit you?
- A Yes, they busted my windshield and the side window and dents in the truck.

* * * *

IN THE CIRCUIT COURT
FOR RUSSELL COUNTY, VIRGINIA

CLINCHFIELD COAL COMPANY, *et al.*,
vs *Plaintiffs*

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants

HEARING ON SEVENTH RULE TO SHOW CAUSE

Arguments and Rulings on Motion
for Continuance on Picket Site Issue

Arguments and Rulings on Motion to
Extend/Dissolve Injunction

September 19, 1989 (Second Day)
Lebanon, Virginia

APPEARANCES:

For the Plaintiffs:

STEPHEN M. HODGES, ESQUIRE
WADE W. MASSIE, ESQUIRE
PENN, STUART, ESKRIDGE AND JONES
The Virginia House
208 East Main Street
(P.O. Box 2288)
Abingdon, Virginia 24210-2288

KARL KINDIG, ESQUIRE
THE PITTSSTON COMPANY
Route 19
(P.O. Box 4000)
Lebanon, Virginia 24266-4000

* * * *

ODOM—DIRECT

[—] Q Have you heard Mr. Roberts make any public pronouncements on the media about this event?

A [No response.]

Q Have you seen him on TV?

A Yes, I have.

Q Have you heard him say anything about injunctions in Courts with respect to the current events out at the plant?

A What I have seen was on a video copy of the 6:00 p.m. news when I got home last night, and I watched it. I didn't see it as the news was live.

Q Can you remember generally what he had to say . . . what Mr. Roberts had to say about this event, about—

MR. HAVILAND: Excuse me. We object to the hearsay and the statement that question seeks.

MR. HODGES: Your Honor, it will be an admission.

THE COURT: I take it is supposed to be under the admission exception to the hearsay rule.

[—] Overruled.

MR. HAVILAND: It is double hearsay. It is in a media report. That is hearsay itself.

—THE COURT: I understood that he heard the statement made by Mr. Roberts. Let me just clarify this.

Mr. Odom, what exactly did you see? Did you hear somebody talking about what Mr. Roberts said, or did you see Mr. Roberts purportedly making these statements on video?

THE WITNESS: He was on camera on the TV station, and they had it on their 6:00 news, and I video tape the news every evening and I watched it when I got home.

THE COURT: Was this him talking?

THE WITNESS: It was Mr. Roberts talking.

THE COURT: All right, overruled.

Q Can you tell the Court the substance of what you remember him saying about the Court's injunctions with regard to the current situation at Moss No. 3?

A Yes, sir. It was that, We are not going to adhere to the Courts and we are not going to stop.

MR. HODGES: That's all. Thank you.

* * * *

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, VIRGINIA

CLINCHFIELD COAL COMPANY, INC.

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA

APPEARANCES:

STEPHEN M. HODGES, ESQ., Abingdon, Virginia
WADE W. MASSIE, ESQ., Abingdon, Virginia
KARL K. KENDIG, ESQ., Lebanon, Virginia
Counsel for the Plaintiff

JAMES M. HAVILAND, ESQ., Charleston,
West Virginia

WILLIAM D. SHULTS, ESQ., Washington, D.C.
Counsel for the Defendant

HEARING OF OCTOBER 4TH, 1989

* * * *

RIFE—RECROSS

[184] Q Mr. Rife, on July the 5th, isn't it true that you reported two individuals hit your truck with a rock, [185] two people? Do you recall doing that?

A It was when they knocked the windshield out of it.

Q This is the one on July the 5th?

A I don't know the exact date but I know I was going up 600 right below what they call the houses, where the houses are real narrow, and two hands come up over the back of a pickup and knocked my windshield out.

Q Two hands?

A Yeah. They was hunkered down behind a pickup so they just threw rocks and knocked my windshield out as I was passing.

Q And those were the only two hands you saw throwing a rock at you, isn't that right?

A Yeah.

* * * *

[186] Q On July the 13th, you testified about getting a dent in your door and you said there were fifty to seventy-five people. Now, you're not testifying to the Court, are you, that all fifty to seventy-five of those people were throwing rocks at your truck?

A No.

Q Did you see the man that did it?

A No, I didn't.

* * * *

Q Okay. How many of those fifty to seventy-five people were throwing rocks at you?

A I don't know. Only two hit the truck, one on the door and one on the cab.

Q And you went ahead and made the run and I guess you hauled the rest of the day?

A Yeah.

[187] Q Would the same be true for the time on August the 9th when you got hit by—Well, let me start over. When your mirror got hit, how many people were alongside the road there?

A I'd say forty or fifty because, you know, it was a narrow place. They was scattered up and down the road.

Q Now, let me ask you, what kind of distance did you come across that number of people, seventy-five or whatever you said? How were they strung out?

A Well, it was narrow, the road was, you know. I mean, there wasn't no real wide places so they was, you know, kind of scattered out up and down the edge of the road.

Q And, again, you're not saying that every one of those people or even the majority of those people were throwing rocks at you?

A No, there wasn't that many. I'd say three or four or five rocks hit the truck and the mirror and the glass on the driver's side.

Q To your left?

A Yeah.

Q Now, the last day you testified about on August the 14th, I've got here that you said there were forty people and about ninety percent of them were dressed in [188] camouflage. How many rocks were thrown at you that day?

A I don't know.

Q How many hit you?

A Two, I think.

* * * *

Q Mr. Rife, did you recognize any of these people?

A No, I didn't.

Q You didn't know any of them?

A No.

Q Did you ever look at some photographs and try to identify some people?

A No, sir.

Q And you're still hauling coal now?

A Yes, sir.

* * * *

RIFE—REDIRECT

[189] Q Mr. Rife, on this occasion when you saw the two hands throwing rocks from behind a pickup truck, were there some other people in the area along with those other people?

A Yes, there were.

Q And how were the other people dressed?

A Camouflage.

* * * *

Q Mr. Rife, those other people that were in the area weren't throwing rocks at you, were they?

A No.

* * * *

GALT—DIRECT

[247] Q Mr. Galt, were you also on duty on August 9th in the general area of the scales?

A Yes, sir.

Q Were you attempting to photograph something at that time?

A Yes, sir.

Q Did you observe any union officials there on that day?

[248] A Yes, sir.

Q Who did you see there?

A I saw Marty Hudson there on the hill overlooking the scales on the North side.

Q Did you attempt to photograph him?

A I attempted to photograph him and then we moved in for a different angle shot.

Q And what happened when you moved for a different shot?

A We didn't move directly at his vehicle. We moved laterally to it to get a front angle shot on the vehicle to try to get through the windshield and the license plate. And as we got close to the road, we were still on Clinchfield property. When we got about ten yards from the road where 600 and 615 intersect, Marty was in the driver's seat, put the vehicle, I guess, in drive and came down the hill and stopped the vehicle right there on the edge of the road directly in front of us, jumped out of the vehicle. There was myself and cameraman, Jeff Trait with me. He ran directly at Jeff Trait. While he was running, he was yelling, "You want my picture, you want my picture?" And he stopped right in front of Jeff, maybe a foot away from his face, and said, "I'll kick your fucking ass."

* * * *

RULE TO SHOW CAUSE

THE COMMONWEALTH OF VIRGINIA,

To the Sheriff of the County of Russell, Greeting:

WE COMMAND YOU, That you summon

International Union, United Mine
Workers of America
c/o District 28 Headquarters
Castlewood, Virginia

to appear before the Judge of our Circuit Court for the County of Russell, at the Courthouse thereof, on the 7th and 8th days of December, 1989, at 9:00 o'clock a.m., to SHOW CAUSE, if any it can, why it should not be held in civil contempt of this Court and to liquidate certain previously announced civil penalties for its failure to abide by the Orders of this Court, entered April 13, 1989, April 21, 1989, May 18, 1989, June 7, 1989, and July 27, 1989, in that it has violated the terms of said Orders, as follows:

198. On June 6, 1989, the defendant violated the orders as follows:

a 1. At approximate 1:30 a.m. pickets used tire puncturing devices, threw rocks and shot at a vehicle driven by William Adams at the entrance to "Old Ten C" Mine between Nora and Coeburn.

a 2. At approximately 1:30 a.m., pickets threw rocks and shot at a vehicle occupied by Steve Wright at the entrance to the "Old Ten C" Mine between Nora and Coeburn.

199. On August 2, 1989, at approximately 1:00 a.m. pickets threw rocks at a vehicle operated by William Adams on Route 658 south of Coeburn.

200. On September 1, 1989, about 5:00 p.m., pickets threw rocks at a vehicle driven by Tony R. Casebolt¹, approximately one mile outside Clinchco on Route 83.

201. On September 12, 1989, between 12:00 noon and 3:00 p.m., pickets slashed the tires on Walt Crickmer's vehicle at a parking lot in Abingdon.

202. On October 7, 1989, about 6:00 a.m., pickets threw rocks at a vehicle driven by Elmer Bostic at the entrance to SB #2.

203. On October 9, 1989, the defendant violated the Orders as follows:

a 1. At approximately 6:00 a.m. pickets threw rocks at a vehicle driven by Mike Davis at the entrance to the Tiller mine;

a 2. At approximately 6:00 a.m. pickets threw rocks at a vehicle driven by Charlie Bostic at the entrance to the Tiller mine.

204. On October 10, 1989, pickets abducted and beat James Robert Bise and vandalized his vehicle outside Coeburn.

205. On October 11, 1989, pickets threw rocks at a vehicle driven by Dwayne Mullins at the entrance to the Triple C mine road.

206. On October 13, 1989, the defendant violated the Orders as follows:

a 1. At approximately 8:40 a.m., pickets threw rocks at a vehicle driven by Floyd James near the picket shack at SB #2.

a 2. At approximately 4:10 p.m. pickets threatened William Adams at his home in Tacoma.

¹ All of the victims identified herein are either employees of plaintiffs, employees of plaintiffs' contractors, family members of plaintiffs' employees or family members of employees of plaintiffs' contractors, persons performing work or services for plaintiffs or operating vehicles owned or operated by plaintiffs or others performing work or services for plaintiffs.

207. On October 18, 1989, the defendant violated the Orders as follows:

a 1. At approximately 2:10 a.m. pickets threw rocks and shot at a vehicle operated by Earl Robinson on Route 63 across from the McClure No. 1 picket shack.

a 2. At approximately 2:40 a.m. pickets threw rocks at a vehicle operated by Tracy Wood at the main picket shack at McClure No. 1.

a 3. At approximately 1:30 p.m. pickets and union leaders threatened Ed Rudder on Route 652 approximately 2 miles north of Ervington High School.

208. On the night of October 19-20, 1989, the defendant violated the Orders as follows:

a 1. On October 19, 1989, about 11:50 p.m., pickets threw rocks and shot objects at Carlene Gibson between Fremont and the Four-Way;

a 2. On October 20, 1989, about 12:15 a.m., pickets followed Larry Fleming and threw rocks or shot objects at him between Fremont and the Four-Way.

b. Having or permitting roving or moving pickets.

209. On October 20, 1989, the defendant violated the Orders as follows:

a 1. At approximately 1:00 p.m. pickets struck a vehicle driven by Johnny Conaway with a club on Route 652, .6 mile south of Route 645.

a 2. At approximately 9:15 p.m. pickets threw rocks, bottles and nails at persons performing services for Sea "B" Mining Company at Sea "B" Mine entrance.

210. On October 21, 1989, about 11:00 p.m., pickets threatened Brian David Barnette at the Pop-in-Mart in Norton.

211. On October 24, 1989, the defendant violated the Orders as follows:

a 1. About 7:30 p.m., pickets threw a nailboard in front of Cloudy Fuller and threw rocks at his vehicle on Rt. 652 approximately 3 miles from Nora.

a 2. About 11:00 a.m., pickets placed jackrocks in front of a vehicle driven by Joseph D. Hamilton, Jr. on Rt. 63 between Strata and Martintown.

a 3. About 11:50 p.m., pickets threw rocks at a vehicle driven by Ronnie Conaway near the Triple C picket shack.

a 4. About 11:55 p.m., pickets threw rocks and shot at a vehicle driven by Larry Fleming near the Triple C picket shack.

b. Having or permitting roving or moving pickets.

212. On October 25, 1989, the defendant violated the Orders as follows:

a 1. About 11:30 a.m., pickets threw jackrocks in front of a vehicle driven by Burton Martin on Rt. 656 and later brandished weapons and threatened him when he stopped for a flat.

a 2. About 11:30 a.m., pickets threw jackrocks in front of a vehicle driven by Chris Beverly on Rt. 656 and later brandished weapons and threatened him when he stopped for a flat.

a 3. About 2:10 p.m., pickets threw jackrocks in front of a vehicle driven by Eddie Darren Kiser on Rt. 652, approximately one mile east of Rt. 651.

a 4. About 2:15 p.m., pickets threw gravels at a vehicle driven by Larry Fleming and threatened him.

b. Having or permitting moving or roving pickets.

213. On October 26, 1989, the defendant violated the Orders as follows:

a 1. About 11:00 a.m., pickets threw rocks at a vehicle driven by a contractor's employee at the picket shack at SB #2.

a 2. About 1:15 p.m., pickets threw jackrocks in front of a vehicle driven by Wayne Mullins approximately one-half mile above the 651 turn-off toward Triple C.

b. Having or permitting roving or moving pickets.

214. On October 28, 1989, at approximately 1:30 a.m. pickets threw rocks and shot at a vehicle driven by Clayton Stacy on Route 83 approximately 2 miles east of Fremont.

215. On October 30, 1989, the defendant violated the Orders as follows:

a 1. Pickets threw rocks at a vehicle occupied by Brian Bourland at the picket shack for Roaring Fork Mine.

a 2. Pickets threw rocks at a vehicle operated by Leon Beaver on Route 652 at Open Fork Inn at approximately 7:15 a.m.

a 3. Pickets threw jackrocks at a vehicle operated by McNeil Phillips at the main picket shack at McClure No. 1 Mine at approximately 11:00 p.m.

a 4. A picket captain, Robert Dixon, was caught with jackrocks on Route 652 in Dickenson County.

b. Having or permitting roving or moving pickets.

216. On October 31, 1989, the defendants violated the Orders as follows:

a 1. About 8:25-10:20 a.m., pickets chased Danny Mann and caught and beat him in Dunganon.

a 2. About 12:30 p.m., pickets threw jackrocks in front of a vehicle driven by Dewayne Mullins at the Community Center on Rt. 63.

a 3. About 10:00 a.m., pickets threw jackrocks in front of a vehicle driven by Tom Copely, Jr. at the picket shack to the Smith Gap mine.

a 4. About 3:00 p.m. pickets threw jackrocks in front of a vehicle driven by Tom Copley, Jr. at the picket shack at Smith Gap Mine.

a 5. About 1:50 p.m. pickets threw or placed jackrocks in front of a vehicle driven by Luther Turner at the picket shack at Smith Gap Mine.

a 6. About 10:30 a.m. pickets threw rocks or other objects at a vehicle operated by Mike England on Route 636 near the union hall.

a 7. About 10:40 a.m. pickets threw rocks or other objects at a vehicle operated by Jeffrey McCoy on Route 636 near the union hall.

b. Having or permitting roving or moving pickets.

217. On November 1, 1989, the defendant violated the Orders as follows:

a 1. About 8:15 a.m., pickets threw jackrocks in front of a vehicle driven by Joseph D. Hamilton, Jr. on Rt. 624 in the Camp Creek section of Dickenson County.

a 2. About 9:15 a.m. pickets threw or placed jackrocks under a vehicle operated by Joey Baldwin at the picket shack at Smith Gap Mine.

a 3. About 12:20 p.m. pickets threw or placed "dragon's teeth" under a vehicle operated by Junius Sturgill at the picket shack of Smith Gap Mine.

b. Having or permitting roving or moving pickets.

218. On November 2, 1989, at about 11:10 a.m. pickets threw or placed "dragon's teeth" under a vehicle operated by Mark Spradlin at the picket shack at Smith Gap Mine.

219. On November 7, 1989, the defendant violated the Orders as follows:

a 1. About 8:35 a.m. pickets threw or placed jackrocks under a vehicle operated by Tom Copley, Jr. at the picket shack at Smith Gap Mine.

a 2. About 10:00 a.m. pickets threw or placed "dragon's teeth" under a vehicle operated by Joey Baldwin at the picket shack at Smith Gap Mine.

a 3. About 10:50 a.m. pickets threw or placed "dragon's teeth" under a vehicle operated by Tom Copley, Jr. at the picket shack at Smith Gap Mine.

220. On November 8, 1989, at approximately 12:45 a.m. pickets threw or placed jackrocks under a vehicle operated by Joey Baldwin at the picket shack of Smith Gap Mine.

221. On November 9, 1989, defendants violated the Orders as follows:

a 1. At about 3:45 p.m. pickets threw or placed jackrocks under a vehicle operated by Tom Copley, Jr. at the picket shack at Smith Gap Mine.

a 2. At about 2:50 p.m. pickets threw or placed jackrocks under a vehicle operated by Joey Baldwin at the picket shack at Smith Gap Mine.

b. Having or permitting moving or roving pickets.

222. On November 14, 1989, at approximately 12:00 noon pickets threw or placed jackrocks under a vehicle operated by Charles Willis at the picket site at Smith Gap Strip Mine.

223. The defendant, International Union, has violated the Orders of this Court on all days since October 25, 1989, by virtue of the following:

a. Failure to use all lawful means readily available to insure compliance with the Orders; and

b. Failure to report to the Court in writing the date and nature of violations of the Orders.

And have then there this writ.

WITNESS, Donald A. McGlothlin, Jr., Judge of our said Court, at the Courthouse, this 17th day of November, 1989, and in the 213th year of the Commonwealth.

/s/ Donald A. McGlothlin, Jr.
Judge

VIRGINIA

IN THE CIRCUIT COURT OF RUSSELL COUNTY

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs,

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, *et al.*,
Defendants.

Tuesday, October 17, 1989
Clintwood, Virginia

The above-entitled matter came on to be heard before the Honorable Donald A. McGlothlin, Jr., Judge of the Circuit Court of Russell County, at the Courthouse, Clintwood, Virginia, beginning at 3:30 p.m., when there were present on behalf of the respective parties:

For the Plaintiffs:

STEPHEN M. HODGES, ESQUIRE
WADE W. MASSIE, ESQUIRE
KARL K. KINDIG, ESQUIRE

For the Defendants:

WILLIAM O. SHULTS, ESQUIRE
JAMES M. HAVILAND, ESQUIRE

* * * *

[19] The Court has heard no evidence from the Plaintiffs concerning how much money was lost in the operation of its business as a result of allegations of misconduct or any type of conduct around its facilities.

The only exception to that might be the question about how many tires blown out and replaced, how many windshields were blown out and replaced, some of that was taken several months ago in earlier hearings; some of that evidence was introduced on cross-examination by the Defendants.

The Court has not considered any issue or element of the compensation to the Plaintiffs in any of the prospective fines. The sole purpose of the fines is to secure, on behalf of the Defendants and its agents, compliance with the law and compliance with the Court's Orders.

So, that in the Court's mind is not an issue in this eighth Rule to Show Cause. Since compensation of compensatory fines are not being posed, the Court finds that all of the request for documentation about alleged loss of income or expenses, which would normally have been incurred during a period of September 17 through the 20, is irrelevant in this proceeding.

* * * *

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, VIRGINIA

CLINCHFIELD COAL COMPANY

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA

APPEARANCES:

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HEARING OF OCTOBER 23RD, 1989—Part II

* * * *

The Court is convinced, as I've stated numerous times, that this is a civil contempt proceeding. The only way that any fines or any penalties can be assessed is for the defendants to fail to comply with the Court's injunctive orders and the laws of the Commonwealth of Virginia as are stated or as are outlined in the order. This is not punitive. It is compulsory. It is designed to compel compliance and therefore it is not criminal in nature but civil. The Court does not feel that the law that is stated in the U. S. versus Twentieth Century Fox case is appli-

cable to this case at hand. Therefore, the demand for a jury trial will be denied. Any other preliminary matters, gentlemen?

* * * *

JONES—DIRECT

[50] Q Do you know who Cecil Roberts is?

A Yes.

Q The vice-president of the International Union?

A Yes, sir.

Q Did you see any other people you recognized as leaders of the union?

A Yes, sir, I did.

Q Who else did you see?

A Well, I didn't see anybody at that time other than Cecil Roberts there giving a speech.

Q What was Mr. Roberts saying?

A Mr. Roberts told the people that a few minutes ago or a little while ago ninety-seven people had gone into the plant. They were going to take it and hold it and that he wanted it peaceful but he wanted everybody to stay because they were going to stay in there as long as it took.

Q Now, did Mr. Roberts have any kind of [51] headquarters there that you saw?

A Yes, sir, he had a trailer type situation right in front to the right of the main gate of Moss 3 with communications.

Q When you say communications, what kind of communications?

A Well, he had a portable radio that he carried with him and he made several phone calls from inside the place where he was—We never did go in there but he went in to call his attorneys and came back out at one point during the takeover.

Q This was at some later time, I take it?

A Yes, sir.

Q Did you observe whether the leaders appeared to be in control of the groups of people there?

A Yes, sir.

* * * *

[61] Q Did you have any discussion with the people inside the plant about leaving?

A Yes, sir, I had discussions. I spoke up and asked them—I told them that they were trespassing and asked them to leave.

Q What was the response?

A No.

Q Who gave that response?

A A bunch of them. Mr. Roberts said that they weren't going to leave and Mr. Blaylock said that they weren't going to leave.

* * * *

DEAHL—DIRECT

[72] Q Did you see Mr. Cecil Roberts as you were going in the office?

A He come a little later, him and two other gentlemen walked up the same route that the other people had come. Yeah, I saw him.

Q What did Mr. Roberts do?

A He had a speaker that you talk in and he come around the thickener between the office and the plant. It probably wasn't a hundred feet away and he spoke to the men on the roof and told them they did a great job and to keep it up and to expect some union officials, some State Police and company officials to come in. They want to come in the plant, look it over, and then they'll leave. And he told them then if you see the State Police coming by themselves prepare yourselves.

* * * *

SANDERS—DIRECT

[86] A Well, the entrance was blocked until way up in the night, after midnight. Sometime after midnight, some of the people that were blocking the entrance proceeded to lay down. Some moved a few feet from the main entrance and land down on the sides of the road and so forth. The crowd was there but they weren't in the main entrance. Some were laying blocking the main entrance but they got sort of away from it a few feet. That happened, dwindled about 2:00 a.m. that morning. I went to sleep about 2:30 in the truck, got up at 4:30 and about somewhere around 5:00 a.m., they started gathering again, the people who had left the main entrance to the side sleeping started gathering back into the main entrance.

Q Do you think it would have been possible for the workers at that plant to get in and go to work that night because of the crowds out on the road, forgetting for a minute the people who were inside the plant?

A No, sir. Every time myself or anyone in management or anyone who did not have permission would move towards the main entrance there would be crowds gather to the main entrance and block it.

Q And when you say did not have permission, who was giving that permission?

A Cecil Roberts.

[87] Q Is he the vice president of the United Mine Workers?

A Yes, sir.

Q Now, on Monday, September 18th, did you see any union leaders out among the crowd gathered in front of the plant?

A Yes, sir.

Q Who did you see there?

A I saw Cecil Roberts, vice president of the UMWA. I saw John Cox. I saw Jackie Stump, president of District 28. That was at the main entrance on Moss 3.

* * * *

[91] A Well, first of all, I stated who I was and what my job was and that they were trespassing and they were subject to arrest if they continued to trespass and also [92] that they were in violation of the State injunction issued by the Circuit Court of Russell County and also the U.S. District Court injunction.

Q Did you have any response to your statement?

A Yes. There was a man behind me just a few feet, Daniel Jessee, that said, "We're stockholders." And then Cecil Roberts gave a little talk and he said that—He said several things. First of all, he said, "I want the people here to know, the men here to know, that this only constitutes a misdemeanor." And I understood myself that he meant their overtaking the plant and being there illegally constituted a misdemeanor. He also said that he wanted the members of management that were there and the State Troopers to look and make sure that the operation had not been altered or they had not done anything to damage the operation since they took it over.

Q Did you ask permission to reread the memorandum or the notice a second time?

A I did. I asked their permission.

Q And was their permission granted?

A No. Cecil said there was no need, that everyone was there and everyone heard it and understood it.

* * * *

[96] Q Will you tell the Court just in a general way what conditions you found in the plant when you went back in?

A I sure would. I went into the area outside the main panel. And outside the main panel front entrance, there as a pair undershorts laying in the floor. There was paper, trash, all in the main panel. There was tissue paper, rolls of tissue paper on the main panel floor. There was food bags, which is commonly called C ration bags, they were laying all over the main panel floor and the power center which is back behind the main panel. There was barricades of doors. The front main entrance

of the main panel was barricaded with a steel wheel with a stem and a rod on the inside. The back door going out of the main power center to the area which we call out frost [97] cell floor was chained. The stairwell going up from the third floor level to this fourth floor area behind the main power center was barricaded with scrap metal, with steel grating, anything heavy they could get their hands on and barricade it.

Q There was three particular areas that I could not stand the smell. I couldn't stand around very long because of the smell of urine. I saw three water hoses that had been looped over some piping and they had put some shower heads on the end of the water hose and used them for a shower. I saw some makeshift hammocks that had been roped to some steel structure on the ceiling. They just left them there pretty well up.

Q Mr. Sanders, did you see any people inside the plant that you know to be leaders of the United Mine Workers on any of your visits?

A Yes.

Q Who were those people?

A Of course, Cecil Roberts led me in each time on the three occasions I went in. Also, I was introduced to Eddie Burke who was introduced as a UMWA strike coordinator and he self proclaimed to me that he was leading the men inside the plant. And he was there inside the plant. Also, another UMWA International member [98] introduced himself as Ricky Blaylock and I saw him on each occasion.

* * * *

Q All right, sir. Mr. Sanders, was there ever a time in this three day period that this occupation occurred when the main entrance and the raw coal pile entrance were not blocked with people in camouflage?

A Not that I'm aware of.

* * * *

CRICKMER—DIRECT

[116] A Tuesday evening, the crowd was just wild. I mean, it was—I returned back Tuesday evening late and it was building to a point that it was almost scary. I mean, fifteen hundred people screaming and hollering holding the main entrance.

Q Were you around during the day on Wednesday?

A Yes.

Q Was there a crowd there on Wednesday?

A Building higher and higher all day long.

Q Were there any speeches made?

A Yes.

Q Did you hear Cecil address the crowd and tell them whether they were going to leave or not?

A Yes.

Q What did he say?

A He said they wasn't going to leave. He didn't have to obey the Court orders. He said that he didn't have to go to Court. He said there's two thousand people here and more coming and we're all going to get arrested first before the people in the plant get arrested. That was the gist of it and it went on for sometime. Other people made speeches. It was pretty wild.

Q Now, Mr. Crickmer, let me show you a couple of pictures here, Nos. 34 through 41, and ask you if these [117] depict scenes during the Monday, Tuesday or Wednesday of the crowds outside the plant, if you saw those crowds?

A Yeah.

Q Okay. You've just identified No. 34. How about 35?

A I was there.

Q All right. Does this show any union leaders in this picture, 35?

A It shows Keith Leonard, Jackie and—

Q Jackie Stump?

A Jackie Stump, John Cox, Cecil Roberts.

Q All right. Go on to the next one, sir. What does it show?

A John Cox with the bullhorn and the entrance to the plant.

Q Is that 36?

A No. 36.

Q No. 37, what does it show?

A It shows Cecil and various other union members standing around the entrance to the plant.

Q All right. What does 38 show?

A It shows a large contingency there blocking the entrance, blocking the main entrance to the plant.

* * * *

JOHNSON—DIRECT

[133] Q About what time did that speech start?

A That was approximately 7:00 o'clock.

Q Did you make some notes of Mr. Roberts' speech?

A Yes, sir, I did. My supervisor asked me to observe and make notes. I did make notes of several things that Mr. Roberts had said.

Q What did he say?

A Well, first off, he said that when Mr. Mike Odum and Paul Douglas died that he would have to hire pallbearers because there wouldn't be anybody to bury them. He said that he wouldn't go to jail because he said McGlothlin didn't have guts enough to put him in jail.

Q Is that Judge McGlothlin?

A I take it to be that. He said McGlothlin. I take it to be that.

* * * *

RANDOLPH—DIRECT

* * * *

[—] down to Hanging Rock Clinic, down in that area down there. There was two men walking in camouflage, walking on the left-hand side of the road. They had

flashlights and they flashed their flashlights in my eyes as I came by there. There wasn't anything said or anything like that. I looked over on the right there. There was two vehicles setting there with people in those vehicles. They also flashed their lights on me as I came by. I proceeded on into St. Paul and when I got to Meade's Muffler Shop down there just before you get into St. Paul, there was one vehicle setting there and that vehicle had two occupants in it. Of course, I couldn't recognize anybody in the vehicles but there were two occupants in there. They also flashed their lights. And I knew, you know, something wasn't right because, you know, they were flashing their lights on my vehicle and off and I couldn't understand, you know, what was happening. I got through St. Paul and I got to Piggly Wiggly, there past the Piggly Wiggly parking lot, the same thing happened. There were two vehicles setting there. They flashed their lights. As I got to the red light where you turn onto Highway 58, there was a small white vehicle came up on me at a high rate of speed and as I started up the mountain there from St. Paul—

[—] Q. You turned towards Castlewood?

A I turned up towards Castlewood, that's right. And when I went up the mountain there, this small vehicle got close on my rear bumper and I could tell it was white in color through my rear view mirror. Of course, I couldn't tell what make and model it was but it was a small, white car. And he stayed right against my back bumper as I went up the mountain. When I got up to the top of the mountain up there, there's a small family associates, a doctor's office setting on the right there. There was two pickup trucks setting there. One of them was a Ford. It was dark blue or black. And the other one was a Ford, also. It was a brown and a tan.

Q Go ahead.

A When I got up there at the top of the mountain, the guy that was behind me in a small white vehicle, he flashed his lights off and on and those two vehicles setting

there, they flashed their lights off and on. When he flashed his lights, he dropped back behind me and the two trucks came out on the highway behind me. I went on, proceeded, you know, on down to about a half a mile below there to a little place called Stop and Shop, a little grocery there where I normally stop every night there and get a cold drink. And I pulled up in the parking lot at [—] this grocery and when I pulled up, I circled my car around and just put my car in neutral, pulled my emergency brake up and left the lights on. I started around the front of my car and when I started around the front of my car, I saw this pickup truck coming in the upper entrance to the store and the other one came down below him and came in the lower entrance to the store. And the small white car, it pulled up behind the dark Ford pickup at the upper entrance.

Q What time was this?

A. This was approximately 1:00 o'clock in the morning.

Q All right, sir.

A And at that time, when I saw those two vehicles coming in the parking lot, one coming in the upper part and the other in lower part, I proceeded back around my car and I had a .30 caliber hunting rifle in the car. And I picked up the hunting rifle and injected a clip in the lower part of the hunting rifle.

Q Was that store open or closed at that time?

A The door was open.

Q The store?

A The store was closed. The store was closed.

Q Was anybody else in the parking lot but you at [—] that time?

A No, sir, there wasn't anybody else in the parking lot but me at the time.

Q The soft drink that you were going to get—

A Pardon?

Q Was it a soft drink that you get out of the machine there?

A Yes, sir. They have soft drink machines there and I stop there every night and get one on the way home. As I said, when I saw those vehicles pulling in both entrances to the store there, I went back, proceeded around my car. The door was open. My lights were on in my car. The car was setting there in neutral and the emergency brake was pulled and the car was running. I reached inside the car and I had a .30 caliber hunting rifle laying in the seat. I got the hunting rifle out, injected a clip into the hunting rifle, stood by the door. Two guys got out of the pickup truck on the lower side down there, the tan and brown one. They were dressed in camouflage. I looked up at the upper end of the parking lot. Two guys were getting out of the dark colored Ford pickup and they were dressed in camouflage. The two on the lower end didn't have anything in their hand. The two guys in the upper end of the parking lot, each one of them [—] had a baseball bat. And I asked the people twice, I said, "What do you people want?" And nothing was said. I glanced at the front of the pickups and the tags were covered with something. I don't know what it was but the tags were covered with some sort of tags on either one of the vehicles. When I asked them the second time what they wanted, I stepped out clear of the door of the car with my rifle. And when they saw the rifle, they turned around and proceeded back to their truck immediately. There wasn't anything said. They didn't say anything when I asked them twice what did they want. When they turned around to go back to the vehicle, I got back in my vehicle and went across the median. They had the two entrances blocked. I went across the median into —There's a drive-in restaurant there called Ma's and Pa's. I went across the median, into the restaurant, back out on the highway.

Q Where does Ma and Pa's sit in relation to this store?

A Well, it sets to the right of this Stop and Shop.

Q Down the road towards Castlewood?

A That's right, on down towards Castlewood,. And I went across the median into their parking lot and out onto [—] the main highway. I looked back in my rear view mirror when I pulled out on the highway and they were coming behind me. They followed me, I'd say, a mile or a mile and a half on down 58. I was going towards Hansonville. At that time, there was three State Police cars coming up westbound going towards St. Paul in the other lanes. When they saw those State Police cars, why, I looked back in my rear view mirror and they started braking and turning off. And I proceeded on to my home.

* * * *

MEADE—DIRECT

[—] A I was loading from Yowling Branch coming down Route 600 loaded and it was between the first and second set of railroad tracks about two miles, a mile and a half or two miles, North of the 621 and 600 intersection, there was fifteen or twenty picketers on my left-hand side of the road as I come down. They threw rocks. I was hit three times. I was hit on the driver's side windshield, the passenger side mirror and the driver's door. And I got two jackrocks on that occasion.

Q You called them pickets. Why do you call them pickets?

A They were dressed in camouflage and there was one of the boys that was with them that I knew that was charged with throwing a jackrock.

Q How did you know him?

[—] A I know him. He lives in my area.

Q Is he a member of the United Mine Workers?

A Yes, he is.

* * * *

MANN—DIRECT

[210] BY MR. HODGES:

Q Are you Danny Mann?

A Yes, sir.

Q Do you work for Clinchfield Coal Company?

A Yes, I do.

Q How long have you worked for them, sir?

A Fifteen years.

Q And did you come under some sort of rock attack on September 10th of this year?

A Yes, sir.

Q Were you attempting to enter the McClure No. 1 mine complex at that time?

A Yes, I was. I was crossing the picket line.

Q About what time of the day or night did this occur?

A About 11:25 p.m.

Q All right. Describe to the Court what happened as you approached the intersection at Route 63?

[211] A Well, as I turned in, there was two groups of pickets, about three in each group, and as I made the turn, they was one boy standing in a blue shirt and light colored shorts, he threw a rock at my car.

Q Did you actually see him throw the rock?

A Yes, I did.

Q Do you know the man?

A Yes, I do.

Q What's his name?

A Barry Mark Hall.

Q And is he an employee of Clinchfield out on strike?

A Yes, sir.

Q Is he a member of the United Mine Workers?

A Yes, sir.

Q Now, you said there were several people in the group. How were those other than Mark Hall dressed?

A They were all dressed in camouflage.

Q How far did this event happen from the picket shack at 773 and 63?

A It was right at the picket shack.

* * * *

JOINTER—DIRECT

[212] A A few minutes later, the other guy that was in the truck; there were two individuals in the truck; both of them got out and they stood at the striker's shack talking. I would say about ten or fifteen minutes later, the driver of the vehicle walked to the Port-O-Potty that was outside. It was on the other side of the road from the striker's shack. And as he was walking across the road, we could see him pulling things and throwing them out into the road. He came back a few minutes later. He talked a few more minutes with the people at the striker's shack and got in his truck and drove off. At that point, my partner and I, Security Officer Ringston, we walked down to the front of the road and at that time, we picked [213] up about forty or fifty roofing nails that had been laid across the road from where this guy had walked.

Q And how far did this happen from the picket shack at Smith Gap strip mine?

A The roofing nails were all across the road almost directly in front of the picket shack, maybe about ten feet away.

* * * *

IN THE CIRCUIT COURT
FOR RUSSELL COUNTY, VIRGINIA

In Chancery No. 12,486

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

vs.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants

CONTEMPT HEARING
[Second Day]

October 24, 1989
Lebanon, Virginia

APPEARANCES:

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* * * *

I. RASNAKE—DIRECT

- [73] Q What mine were you going to?
A Double R.
Q Whereabouts did this happen?
A About a mile and a half up Wilder up Route 600.
Q Did you see who did this to you?
A Just camouflage on the side of the road.
Q And what happened?
A Well, I was going up through there. There was some trucks, and there was a rock come flying out of the crowd.
Q How many people?
A Probably 100, 150.
Q Vehicles?
A I don't know how many vehicles. There was a line all the way up the side of the road.
Q What damage was done to your truck?
A Busted the windshield and caved in the door.
Q On what side?
A Passenger side. The windshield was on the driver's side, and the passenger side door.
Q Did you report it at the scales?
A No, I went on to Double R, loaded, and started back out. And they was on the other side of the mountain, and they rocked us again. And we come back to the scales and reported it.

[74] Q Who is "us"?

A Me and Keith Viers, and there was another truck or two behind me.

Q So you got hit again that same trip?

A Yes, yes.

Q What damage was done the second time?

A They hit the windshield on the passenger side and hit the cab and stuff.

Q How many were in that group?

A There was about 20 or 25 people there.

Q How were they dressed?

A Camouflage.

* * * *

J. RASNAKE—DIRECT

[161] A There was more jackrocks, more rocks throwed. I had already had one tire going down. And when I got to the power plant in Carbo, two more starting going down. And I got right below the power plant where you go out of the N & W terminal there, pulled off on the left and had three flats. And at that time I was surrounded.

Q Let me ask you—why did you pull off?

A Well, the truck wouldn't go any farther.

Q How many flats did you have?

A Three.

Q What happened?

A Well, at that time I got out and started changing the tires. And a guy in a gray Ford pickup pulled up. A couple of minutes later, they was three more vehicles pulled in. About 12 people surrounded me on the road side and in front of my truck and told me I wasn't changing my tires and the truck wasn't going anywhere.

Q Did you try to change your tires?

A Yes, sir.

Q What happened?

A Every time I would get down, they would start moving a little closer to me.

Q Did you have any kind of protection with you?

A Yes, sir, I had a .22 pistol.

[162] Q What did you do with that when you were trying to change the tires?

A Well, I would have to lay it down. And when I would start to put my tire on, they would start moving in. So I just got up and decided I wasn't going to be able to change my tires. We talked and argued 10 or 15 minutes, and I walked around and got one's tag number off the gray Ford pickup which was SRC 495. The police ran it through, and it was tags that belonged to a Bronco.

MR. HAVILAND: Objection, hearsay.

Q How were these people dressed?

THE COURT: Just a moment. I am not sure what the witness is saying. Mr. Rasnake, you said that it belonged to a Bronco. Were you told that, or did you see that?

THE WITNESS: I was told that by the state trooper after he ran it through.

THE COURT: The objection is sustained.

Q. [Continuing] How many vehicles pulled up surrounding you there?

A The gray Ford truck, then another car, and a pickup with a little black bed on it, and then another older model Ford. There was four vehicles.

Q How many people all together?

A About 12. I counted 12.

[163] Q How were they dressed?

A Camouflage.

Q What were they saying to you?

A Just told me I wasn't going to change the tires and the vehicle wasn't going anywhere. So after we argued about 10 or 15 minutes, I told them I was going to call the state police, which at that time I back up, walked out to N & W train station, called the state troopers. They didn't get there till about 3:00 o'clock, 10 after, a.m.

Q How far is this train station?

A A quarter of a mile.

Q Did you leave your vehicle there?

A Yes, sir.

Q Did the state police eventually come?

A The state police came, and they told me when they got up to the terminal that my truck had been turned up on its side and all of the windows broken out of it.

* * * *

KING—DIRECT

[230] Q Did anything unusual happen to you as you were trying to get to your home in the early morning hours of August 22nd of this year?

A Yes, sir.

Q Will you explain to the Court what happened?

A Okay. We was a little bit late getting off from work that night. And I was going home. I made the turn off of 63. And when I made the turn and went across the railroad tracks and started through a little curve, it was six men in camouflage jumped up out of the ditch. One of them had a shotgun and shot through my car, and the rest of them hit me with rocks.

Q And then did you see anyone come and pick them up after this happened?

A Yes, sir.

Q Tell the Court how that occurred.

A Well, when I come to a stop after they hit me and backed up, as I was backing up, they run up the hill, and this truck pulls up this top road and stops. And they all jump in the truck.

Q Now, Mr. King, did this occur on a road that turns off of Route 63 in the Dickenson County area?

A Yes, sir.

Q And had you ever seen any camouflaged dressed people in that area before this incident happened?

[231] A Yes, sir.

Q On about how many other occasions?

A Probably four or five different occasions.

Q You say someone shot at you. Did you hear a gunshot?

A Yes, sir.

Q Could you tell what kind of a firearm it was?

A Yes, it was a shotgun.

Q Did it actually hit your car?

A Yes, sir.

Q Did other things besides pellets from a shotgun hit your car?

Yes, sir.

Q What were those things?

A Rocks and water balloons.

Q Let me show you Exhibits 82 and 83, which are two pictures, and ask you if you can identify those items.

A Yes, sir.

Q What are they, sir?

A Well, that is where the shotgun went through the door and went through my seat.

Q Is that where you are holding a tape measure?

A Yes, sir.

Q Did it go all the way through the door?

A Yes, sir.

VIRGINIA:

CLINCHFIELD COAL COMPANY, *et al.*,
Plaintiffs

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants

Lebanon, Virginia

November 15, 1989

* * * *

GALBREATH—DIRECT

[39] A On Monday morning, October 16, I arrived at the Cleveland Ball Field at approximately 6:25 A.M. There was approximately four vehicles already there in the parking lot, and the lights were on in the building. As the morning went on, groups of vehicles approached the ball field and turned into the ball field. By 7:25 A.M. there was approximately 225 vehicles parked in the Cleveland Ball Field. All of them went into the building. The meeting appeared to begin around 7:05 A.M. They broke up at approximately 7:28 A.M. on that morning, and they immediately went back to their vehicles and departed the ball field.

Upon departure, approximately 164 vehicles came out of the ball field, took a left, and went toward the Carbo intersection up at 615. Approximately 55 vehicles went toward the Cleveland area, and six vehicles remained at the building.

Q How about the 17th?

A On the morning of the 17th, Tuesday morning, I arrived at the ball field at approximately 6:34 A.M. Again, there was approximately six vehicles already in the lot and the lights were on in the building. Total count of vehicles that went in on that particular morning was 156 vehicles. It was raining that morning and all occupants [40] appeared to immediately go right into the building.

The meeting broke up, or they broke up and left the building at approximately 7:25 A.M., and upon departure 129 vehicles went toward the Carbo intersection, again leaving the ball field and taking a left; and 13 vehicles went toward Cleveland, and approximately 17 vehicles stayed right there at the ball field.

* * * *

RATLIFF—CROSS

[110] Q The last incident here on September 12, you had your windshield replaced?

A Yes, sir.

Q That day?

A Yes, sir, that day.

Q How long did it take to get it replaced?

A About an hour and a half, maybe two hours.

Q So you drove another four or five hours that day after that?

A Yes, sir.

Q How much did that windshield cost?

MR. MASSIE: I object to the relevance of this, how much a windshield cost, somebody throwing rocks at a moving vehicle.

MR. HAVILAND: We have been through this before. We think it is relevant and should be in the record as to the size of the fines.

THE COURT: The Court has many, many times said the size of the fines has nothing to do with compensation for damage; it is a prospective fine that is only imposed if there has been proof of violation of the Court's order. The purpose of the [111] fine is to obtain compliance with the Court's order and to force, to try to force basically a financial giant to comply with the Court's order. I will allow you to ask the questions that may have to do with some member—

* * * *

WHITED—DIRECT

[137] A I was talking to them, setting on the back of our car, and I heard some gravel, you know, just sling, and there was three vehicles flyed in there beside the car. And before I really knowed what was going on, people got out of the truck, run around behind our car, come down in front of it. Before I could get in my truck, they done had me and had me bent over in front of a car.

Q How were these people dressed?

A Okay, they had ski masks on and one of them had a camouflage coat on that I seen.

Q Did they say anything to you?

A Yes, the first thing, "Boy, do you work—

MR. HAVILAND: Objection. Hearsay.

THE COURT: Overruled.

A They said, "Boy do you work for Pittston?"

And I said, "Yes."

BY MR. MASSIE:

Q What happened?

A Then they bent me over that and took a ball bat to the back of my legs while they beat me with rocks.

Q How many people were there in your estimation?

A Anywhere from eight to 12.

Q How many times were you struck?

[138] A I guess anywhere between 10 or 13 times.

Q What struck your legs?

A A baseball bat.

Q What struck your head?

A Rocks.

Q Did you lose consciousness?

A Yes, I did there for a little while but I am not for sure how long.

Q When you came to, what was there?

A They was gone. I was just laying there in front of my truck.

Q What condition was your truck in?

A It was wrecked. Glass beat out of it and headlights, tail lights, back tires was cut on it, mirrors was beat off of it and stuff.

Q Did you report it to the state police?

A Yes.

Q Let me show you what has been marked as Plaintiffs' Exhibit 77. Can you identify that picture?

A Yes, right there is when they took a picture of the back of my legs.

Q Is that the day after?

A Yes, the very next day after.

* * * *

COLLEY—DIRECT

[174] * * * I looked across the street parallel to my building, and I noticed a little brown Volkswagen sitting there with no tag in front. I noticed that because I have been followed quite a bit in the last few months, and I always see who is around before I feel secure. I thought, "There is no tag on that car." And I saw a lady get out of the car and head to the bathroom. I thought, "Well, I am safe. It is no men in it." I was busy doing my books and all this. I heard—I didn't hear this first. Let me think.

I saw the Blazer pull into the lot at the gas pump. It was on the outside gas pump, and it was headed north. The little car had pulled in at a corner and I did not link anything together until I saw four men jump out of the car, the little Blazer, and start—the profanity, you can't even repeat what was said. It was, "You g—d—scab," and all of this.

I ran to the door and I don't know where this large man came from. I didn't see him get out of the car, [175] but he was in the middle of the parking lot and I saw this black guy attack him from the front. And then these other guys, two more guys attacked him from the rear, from the back. They pulled his shirt off of him. They beat him unmercifully, and they knocked him to the ground. They pulled him backwards and they started kicking him with their boots. They had on boots above the knee, I mean above the ankle, and they started kicking him.

Q How were these people dressed?

A They were all in camouflage. The first guy that attacked was black. The others were white. And one stood—four got out and one stood at the side of the car

about where the gas tanks are, you know, on the side. He was the one that was screaming the profanities.

* * * *

VERNON—DIRECT

[217] * * * that is when I got hit. I got hit on the right rear panel window and back glass of my Jeep.

Q Where did the rocks come from?

A From the picket area, shack area.

Q How many pickets were there?

A Six to eight.

Q Did you know any of the people there.

[218] A I knew one, the one that was looking through the binoculars at me.

Q Who was that?

A That was Daniel McGlothlin, an employee of Seaboard 2 mine.

Q On strike?

A Right.

Q Member of the United Mine Workers?

A Right.

* * * *

BARNETT—DIRECT

[266] Q What happened to you at that time and place, Mr. Barnett?

A Well, I was closing the gate. As I closed the gate about 5:00, around about five picketers came toward the gate. I stepped back from the gate. They started calling me names and stuff like that. As I turned back around to face them, one guy, one of the guys threw some kind of chemicals in my face. I thought it was something like—how can I say—some skunk oil; I would be stinking all day. As a second passed it started burning my face and eyes like I was on fire, something like that. At that time my partner who was with me took me back to the truck and I started putting water on my face, and

it was intensifying the burning. About five minutes later the response team came and started to put water and soda on my face to relieve the pain. They put me in the response vehicle. They were taking me to the hospital. They stopped a state trooper and the state trooper transferred me from the response vehicle into their vehicle and transported me to Humana Hospital.

Q Mr. Barnett, was this your regular duty at the area of the gate of the Sea "B" No. 2 mine?

A Yes, it was.

Q How were these five individuals dressed who [267] approached you?

A In camouflage fatigues.

Q What sort of thing did they say to you before one of them threw chemical in your face?

A They said, "Nigger, you need to go back to Africa." One said, "No, they won't take him back to Africa."

One said, "You stick your head out here and I'll cut your neck off." He had a knife in his hand.

I turned—not facing them—but when I turned back around to face them, that is when the one threw the acid in my face.

Q—Is there a picket shack near that gate?

A Yes, there is.

Q About how many feet is the picket shack from the gate that you were trying to open?

A Roughly, say 25.

* * * *

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, VIRGINIA

CLINCHFIELD COAL COMPANY, INC.

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA

APPEARANCES:

STEPHEN M. HODGES, ESQ., Abingdon, Virginia
WADE W. MASSIE, ESQ., Abingdon, Virginia
Counsel for the Plaintiff

JAMES M. HAVILAND, ESQ., Charleston, West Virginia
WILLIAM D. SHULTS, ESQ., Washington, D. C.
JAMES J. VERGARA, JR., ESQ., Hopewell, Virginia
Counsel for the Defendant

PROCEEDINGS OF HEARING OF DECEMBER 7TH,
1989

* * * *

GIBSON—DIRECT

[31] Q You're Carlene Gibson?

A Yes, sir.

Q Where do you work?

A McClure.

Q For Clinchfield Coal Company?

A Yes, sir.

Q Were you involved in any incident on the night of October 19th of this year on your way home?

A Yes, sir.

* * * *

[32] Q Can you describe what happened to you that evening?

A Yes. It was snowing that evening, well, that day, and the roads was pretty slick and there's a horseshoe curve there. And I had slowed down to go—Well, it swings back right-handed and I had slowed down to go around the curve and there was four guys come up over the guardrail. All four of them had a rock and they threw them at me. And when I seen them, I kind of swerved to the left and it went right through the windshield beside me and the rock landed in the seat beside of me. And I stopped. And when I stopped, there was a fifth one hit me in the front. I heard a shot go off. I don't know whether they was shooting for my radiator or what but it caught in the tube on my push bar.

THE COURT: Caught in the tube of—

WITNESS: On my push bar.

Q Is the push bar a metal device in the front of your vehicle?

A Yes.

* * * *

BEVERLY—DIRECT

* * * *

[64] A I was in my truck. I got back in my truck. Everybody got in their truck except Blackbeard. They caught him out of his truck because he was in front and they were right in front of him. He eased back around and got in his truck. He got on our company radio and tried to get ahold of one of our other men at another job so [65] they could call the State Police. As he was trying to do that, they was around my truck surrounding me and wanted me to come out of my truck. One individual had his hand on my mirror bracket beating on my window. He wanted me to come out. He wanted to whip me.

Q What was he saying to you?

A He said, I want to whip your ass. Come out of that truck. He said, come out right now.

Q Do you know that individual?

A Yes, I do.

Q Who is it?

A Marty Hudson.

Q What happened then?

A He kept beating on my window. He done that for about five minutes, I guess, or something like that. I just sat in my truck and never even looked his way. Finally, he crawled down off the side of my truck and another individual took his hand and wiped all the fingerprints off my mirror bracket. The guy had gloves on. He wiped them off. All right. So they went up to the truck and was keying up on the CB so nobody couldn't get through.

Q What do you mean, keying up on it?

A They was holding the mike down so you couldn't [66] transmit.

Q Who was?

A The individuals in the vehicles, the camouflaged picketers. So we couldn't get ahold of the State Police. So they sat there for four or five minutes and you could hear them on the radio, what are we going to do, we're going to sit right here a little bit, they said. I guess we was there about twenty minutes. They finally got in their vehicles and left.

Q Did you hear any of the other camouflaged people besides Mr. Hudson say anything about whether you were going to continue to haul coal or not?

A There was one older gentleman; he was probably in his early sixties; was talking to the third truck. He was back there talking to him. And as he come back after they all left my truck and was going back to their vehicles, he come by me. He says, you better park these trucks. He said, all it will take is two weeks and we'll get what we want. He said, if you don't park them somebody will be shot.

Q Was Mr. Hudson present at that time?

A Yes.

* * * *

ADAMS—DIRECT

[138] * * * I pulled across and those two cars were going across the tracks and I started across the tracks, looked up and my car and the little car and jeep was there in a line and there's a right-hand turn and a long straight right there. As we went into this turn, I observed the blue and white union sticker up on the jeep and, you know, I thought to myself, I said, well, I wonder what this is or who this is, you know. We just started on up the straight there and right before you get to where you turn into my house, there's a large open field, you know. I guess it's probably fifty or seventy-five yards long. I could see through the back open part of the jeep there, you know, the window cutout thing. I could see the driver looking over and stuff towards the direction of my house. I looked over at my [139] trailer. My wife and the lady that we babysit for were out in the front yard. We approached the house right there at my driveway, a big two story red house. Another little white car came up on me pretty quick. And you have to stop, you know, pretty fast right there to turn in. There's a telephone pole and there's about six or eight mail boxes and another telephone pole and you've got to stop and turn in. And I said, well, I'll just go up and turn. I was afraid the guy behind me would hit me. I still had no idea who was in the jeep or nothing about them. You go up to the end of that straight approximately six houses. There's another set of railroad tracks that you have to go up over. There's a dirt road that turned off to the right which follows some railroad tracks and goes up into High Knob, which is where a lot of people hunt and fish and stuff. Well, I seen the car in front of me slow down. I noticed the jeep turning off and I figured, well, you know, they're either going to stop and turn around or they're going up

in there to hunt. The little car in front of me pulled out and he went on up over the little hump across the tracks. I pulled into the same place where the jeep had pulled in and they were gone. There's a dip going out that road. It goes down through a creek crossing and comes back up on the other [140] side and you go on up in the mountains. At that point, I didn't see it, you know. I just turned around and went on back down, turned in my driveway, pulled in a concreted area next to the house, backed back in to where my trailer was. I started getting out of the car. At that time, the same jeep pulled in with the homemade top on it, hardtop. It was a blue silver or bluish gray looking. I've never seen another one like it. And the vehicle pulled up in front of my car and he said, hey, buddy, have you got a problem? And I said, no, sir, I don't have a problem. I said, can I help you with something? And he said, yeah, mother fucker, you can help us with something. He said, you've got a god-damned problem. And I said, what are you talking about, buddy? He said, what in the fuck are you doing following us? I said, sir, I said, I don't know you. I said, I'm not following you. I said, I live here. I said, this is my home and, I said, that's my wife standing over there. I said, can I help you all with something. What's your problem? There was two people in this jeep. One guy had a ball cap on. He had curly, bushy, dark hair and a beard and he had on a camouflage t-shirt that had a yellow circle on it with a slash. I don't know what it said. The other guy sitting on the side next to me had kindly sandy, brown looking hair and a [111] beard and he was sitting there and he said, well, he said, I think you've got a problem. He said, why don't you come on out here in the road with us and he said, we'll just settle it right now. And I said, buddy, I don't have no problem. I said, it sounds to me like you all have got a problem. Something is bothering you. And he said, why don't you come on out here and fight us? And I said, no. I said, let me get ahold of the State Police or somebody and kindly let them come down here and see what's going on and

see what the problem is here. And he said, you do that, Mother Fucker. He said, when they get here, we're going to tell them that you started it. And I said, started what? I said, I haven't done anything. I turned around to my wife and the lady that we babysit for and I said, honey, I said, go in there and call the State Police and she got up and I said, and give them this tag number. And it was a bicentennial plate and I started calling the tag number off to her. And she was going in the door and the other lady was standing there all freaked out with her baby, you know. And that guy, he leaned forward like this and started reaching under the seat and he said, well, I've got something right here that will take care of you, Billy Boy. And that time, I turned and went back to my car. And when I opened the car door up on my car, they [142] backed out and hauled ass. And I called the State Police. They came down later on that afternoon, I guess it was around 7:30 or so, the same jeep came back and went back up the road again. At that time, I talked to my wife and the State Police came there—

Q Without getting into the details of the investigation, you saw the jeep later pass by your house?

A Well, that's what I was getting ready to tell you. My wife also told the trooper that jeep had been by there several times that day.

MR. VERGERA: Objection to hearsay.

THE COURT: Sustained.

Q You saw it yourself later?

A I saw it myself later on that afternoon.

* * * *

MANN—DIRECT

[285] Q How many people were in the black Chevette?

A There was three people in camouflage.

Q All right. Go ahead.

A And I immediately recognized the two people in front as being Mark Hall as a passenger and Don Hall was the operator of the vehicle. And I wrote their tag

number down. I was writing it my mirror reading it backwards and I wrote it down. I had a piece of paper there. I didn't know the guy in the back but I did know the two guys in front. They were real close. So as I went on 652 toward Coeburn, they would get real close but I thought they were just going to intimidate me a little bit because I had had an earlier incident with Mark, with Barry Mark. And I [286] knew that they were just probably going to follow me a little bit and intimidate and aggravate me a little bit. But they kept following me. And I got into the Tom's Creek area just North of Coeburn and there was some traffic in front of me and I passed two cars. And there was a coal truck in front of me and I couldn't get around him. And so they couldn't pass the two cars. It was kind of tight. So when the coal truck made the turn, they come around right in a blind curve and passed those two cars that I had just passed. And I felt like then they were pretty serious about what they were going to do. And so I got to the stop sign there of Route 652 and 72 and there was a log truck and he was going pretty slow. So we stopped at the stop sign. They come right back on me real close again and followed me through Coeburn. I contemplated stopping at the police department there at Coeburn but sometimes somebody is there and sometimes there's not. And so I continued on through Coeburn and they were real close. And I kept thinking, well, they're going to peel off any minute. They're letting me know that I knew they're there and stuff. They're going to peel off any minute. So I made the turn off of 58 there back onto 72 again and they continued to follow me. And going out of the corporation limits there of Coeburn, it's [287] kind of downhill and you've got a straightaway you can pass. So I passed the log truck. He was still in front of me. And I passed the log truck and they come up behind me and tried to pass me, kept their momentum up and tried to pass me. Well, I kept my momentum up and wouldn't let them. I continued to stay in front of them. And so I

continued on for about another mile or so and I met a State Trooper. It was right near where a guy used to be a salaried person, Buck Havich And I flashed my lights at the State Trooper. And I didn't get his attention. Well, I got his attention. He waved at me. I don't know, he thought I knew him or something and he did wave at me. And so I continued on to another straight area where there was no cars and they tried to pass me again. And at this time, my car was faster than theirs and I managed to stay in front of them again.

Q You're on Route 58 at this time?

A No, this is 72.

Q You're on 72?

A 72 goes all the way. Where 652 intersects, it comes into 58 in Coeburn and 72 goes off toward Dungannon then.

Q All right, sir.

A 72 goes to my house. Anyway, when I got to this [288] other straight patch, they tried to pass me again and I continued to keep them behind me. And so I was in Wise County. I went into Scott County. The roads are real crooked through there, a lot of curves and a lot of mountainous roads. And so we got off the mountain. They would get real close and they'd back off, get real close and back off and it was just sort of this way the whole distance really. And so we got near where I live and I met a girl that's on the rescue squad. I belong to the rescue squad. I'm on the board of directors there. And I met this girl and she knew me right off the bat so I flashed my headlights on and off to get her attention. And so I went on into Dungannon. Well, the straightaway before I got to Dungannon, these guys tried to pass me again. This time it was really a race. And they got the fender alongside my car but I managed to stay in front of them. But we got on into Dungannon and my brother-in-law is a police officer in Norton and I knew he was at home and I thought maybe he might be out in front of his house. So I drove by his house; this is right through

Dungannon; and his doors was shut but his truck was setting there. And I got by his house and I made a right turn onto a side street. And when I made this right turn, these guys were still right on me. They were right on my [289] bumper and they made the turn, also. And I made the right turn on the side street and went up to the back street that runs parallel with the main street. I made another right turn. And they continued to follow me. And I went three streets back in the direction that I had came and made a right turn again that put me back on the road I was on initially. They were still right behind me. I made a left turn going back North on Route 72 and they made the turn, also. So I went around by the fire department, made a left turn back on this same back street again. Well, they made the left turn. So there was a store down there and I knew I was going to have to make a decision somewhere to get these guys off me because I felt like they were pretty serious about what they were going to do. And I thought, if I can get to that store, I know the guy that runs the store and, you know, if I can get there, I'll have somebody that can see what's going on. I felt like I had the attention of the people, you know, because I had flashed my lights at some people and stuff and they knew—you know, maybe somebody would see something that was going on. So when I got to that store—sometimes he open and sometimes he's not. So I was looking at it and I seen the door open a little bit so I applied my brakes. And when I did, the car behind me rammed me in the rear [290] and it just raised the back end of my car up. And everything just kind of went blank for a second, you know, trying to be composed after being hit and I didn't know what they were going to do. So I opened the door on my car. I just put it in park and left the motor running. I found out later somebody had turned the motor off. But I got out. And as I got out and stood up, they were getting out. And I heard a gun go off. Well, that scared me to death. I knew then that these guys were armed and I

didn't know what their intent was. But I felt like they meant really to try to do me in. But there was too many people there. I've lived in Dungannon all my life and everybody knew me. And so I started to go to the store—Well, Mark, he was in the passenger side. The store was over on my right. My car is here, twenty feet away is the store and two people in the store. Don come up to the driver's side.

Q When you say Don, Don Hall?

A Don Hall. He was the operator of the vehicle. Okay. When I got out of the vehicle, he come up real quick on this side. Barry—I call him Mark. Mark is his middle name. Mark come up to the front of my car and cut me off. And they asked me, said, where in the hell is your damned gun. And I said, I don't have a gun. You all [291] do. You just now fired the gun. Where is your gun. And they was cussing and calling me a goddamned scab and a son of a bitch and everything. And so I seen, you know, that they were pretty serious about this, both of them a lot bigger than I was. The third guy, the Freeman guy, he stayed back. He stayed in the car for a minute or so when this was going on but he did eventually get out. And so I hollered and told the guy in the store; his name is Ross Elliott. I hollered and said, Ross, call the police. And Don said, no, you son of a bitch, we'll call the police on this one. And so it didn't make sense. And so he just shoved me back against the side of my car. And so I managed to stay on my feet and I went back behind their car to try to go back into the store. When I made the turn behind their car, Mark come back around the front of my car and cut me off. I thought he was just going to bully up to me again like they had there when I first got out of the car and just give me a good cussing or whatever. And he sucker punched me in the side of the head and my glasses went off. And he hit me again and knocked me down. And before I could get up, Don come over to do some foot

work. He kicked me in the ribs, I'd say, two or three times and he was trying to kick me in the face. And I was real sore in here where I had protected [292] my face. I was down on my hands and knees protecting my face like this. And I was, you know, real sore after that. And they seen that people were seeing this and they stopped. And I went into the store and Mr. Elliott; I've known him forever; I told him to call the police. And he is an older like guy. He was pretty upset. He said, you call them. So I went immediately to the phone and called the police, called the dispatcher, which the dispatcher knows me through working the rescue squad and stuff. And I told her what had happened. I needed an officer there quick and I said, go ahead and get me an ambulance here because, I said, I have been in an accident and I have been assaulted. And so just in probably a minute, there was a deputy on the scene. Philip Lane, he was there. He is a county deputy. And it just so happened that this deputy was in route to my house when this happened, when the call come in. He was only like a mile away. And he was in route to my house to serve me with a summons to go and testify against Mark. He had hit my car with a rock earlier and I had got him with a warrant. And this was why they were intimidating me, trying to get me to drop this warrant, I'm sure. But, anyway, he served the warrant on me while I was in the ambulance.

Q Let me go back on just a couple of items here. [293] Approximately what was the distance in miles from where this Chevette started following you to where this fight occurred or the beating occurred in Dungannon?

A It was twenty plus. I would say twenty-two or twenty-three miles or something like that.

* * * *

[295] Q Were you injured in this attack?

A Yes, I was. When they hit me in the side of the head, which my glasses went off. All I found of my

glasses was one of the lenses. I don't know what happened to the frames. I went back and looked. Apparently somebody had picked them up. I guess—I don't know who picked them up. All I found was one of the lenses. I had blood coming out of this ear, out of my left ear. My elbow was bleeding and the palm of my hand, when I caught myself, when I hit the road or the concrete there, the sidewalk or something, I had a laceration in the palm of my hand.

[296] Q How many times did Don Hall kick you when you were down on the ground?

A Two or three times in my ribs and probably two to three times—He tried to kick me in the face and I blocked those. I did manage to do that. I blocked them with my hand like this while I was down, you know, on my hands and knees. And I was doing this number to keep from getting licks in my face.

Q Did the CB transmission about, here comes the scab in so and so car, did that accurately describe your car?

A Yes, sir. I drive—I bought this car. It's an older car that I bought for I knew people was having trouble with windows getting broke and stuff and it's a 1980 beige Malibu.

* * * *

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Record No. 92-0299

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,
Appellant,

v.

CLINCHFIELD COAL COMPANY, *et al.*,
Appellees.

BRIEF FOR APPELLANT

* * * *

QUESTIONS PRESENTED

1. Whether the contempt fines must be vacated as moot due to the settlement of the underlying private civil action.
2. Whether the contempt fines are criminal in nature and therefore were imposed in violation of the constitutional protections mandated in the trial in criminal contempt proceedings.
3. Whether the contempt fines must be reversed because they were so unreasonably large as to violate the due process guarantee of the Virginia Constitution and the United States Constitution, as well as federal labor policy.

4. Whether the trial judge, in light of his family's involvement in the underlying controversy and the widely-perceived partiality of the court, should have recused himself.

* * * *

(6)
No. 92-1625

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
v. *Petitioners,*

JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). See also *Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:

Whether—as the Virginia Supreme Court held below—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders.

2. In *Gompers v. Buck's Stove & Range Co.*, *supra*, this Court—in passing on the claim that a civil contempt proceeding survived the settlement of the main civil case that generated the contempt proceeding—held that civil contempt proceedings, unlike criminal contempt proceedings, "necessarily end[] with the main cause": "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled." 221 U.S. at 451. Against this background, the second question presented here is:

Whether—as the Virginia Supreme Court held below—a contempt proceeding may be treated as civil when it generates substantial non-compensatory contempt fines that survive the full settlement of the main civil case solely in order that the court may vindicate its own authority.

3. Whether the non-compensatory civil contempt fines of \$52 million at issue here were so excessive as to violate the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

 No. 92-1625

INTERNATIONAL UNION,
 UNITED MINE WORKERS OF AMERICA, and
 UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Petitioners,
 v.

JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
 and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the
 Supreme Court of Virginia

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Supreme Court of Virginia is reprinted in the separately bound appendix to the *certiorari* petition ("Pet. App.") at 1a-20a and is published at 244 Va. 463, 423 S.E.2d 349. The decision of the Court of Appeals of Virginia is reprinted at Pet. App. 25a-37a and published at 12 Va. App. 123, 402 S.E.2d 899. The decisions and orders of the Circuit Court of Russell County, Virginia, are reprinted at Pet. App. 39a-121a and in the Joint Appendix ("J.A.") at 28-37.

JURISDICTION

The Supreme Court of Virginia entered its decision on November 6, 1992, and denied petitioners' timely petition

for rehearing on January 8, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution are reprinted in relevant part at Pet. App. 124a.

STATEMENT OF THE CASE

1. This action arises from a strike by the members of International Union, United Mine Workers of America, and United Mine Workers of America, District 28 ("the Union"). The strike was called against two affiliated coal companies, Clinchfield Coal Co. and Sea "B" Mining Co. (the "Company"), on April 4, 1989, to protest the Company's unfair labor practices. On April 12, 1989, the Company filed a bill of complaint against the Union in the Circuit Court of Russell County, Virginia, alleging various unlawful strike-related activities—including actions of interference and intimidation by strikers and their supporters directed against those engaged in the Company's operations—and seeking to have the court enjoin the Union from engaging in such activities. The next day, April 13, 1989, the court granted the injunction.

On April 21, 1989, the court, upon the Company's Motion to Amend the Temporary Injunction, modified and strengthened its injunction. The court restrained and enjoined the Union, its officers, agents, servants, employees and members from engaging or attempting to engage in numerous broadly framed categories of acts. Pet. App. 114a-115a.

On May 16, 1989, on the motion of the Company, the court held its first contempt hearing. As was the case in every contempt hearing below, the proceeding was conducted as a civil proceeding tried to the judge who had issued the injunction, rather than as a criminal proceeding tried to a jury (and subject to the applicable criminal

procedure requirements of the United States Constitution). And, as was the case in virtually every hearing below, the Union contended that the vast number of alleged violations of the injunction were not actions attributable to the Union.

At the May 16 hearing, the trial court found that there had been 72 separate violations of its previously entered injunctions—including 15 instances of violence, 43 instances of exceeding picket numbers, 10 instances of blocking ingress and egress to the Company's facilities, and 4 instances of technical violations of the amended injunction, and therefore fined the Union \$440,000. Pet. App. 109a-112a.

At this hearing, the court also established a prospective fine schedule for future violations. The schedule provided for fines of \$100,000 for each future incident involving any violence in violation of the injunction, and \$20,000 for each future incident not involving violence. In addition, these fines were to "double each day, without limitation." Pet. App. 111a.

On June 7, 1989, following another motion of the Company, the trial court held a second contempt hearing, found the Union in contempt, and imposed fines totalling \$2,465,000. Pet. App. 102a-108a.

For three days, July 19-21, 1989, the trial court held a third contempt hearing at the motion of the Company. The court entered a third contempt order on July 27, 1989, which fined the Union a total of \$4,465,000. Pet. App. 97a-101a.

On September 21, 1989, the trial court, at the motion of the Company, issued its fourth contempt order, imposing fines totalling \$16,900,000. In this order, the court empowered the Company's attorneys to collect all the fines imposed on or after July 27, 1989, viz. all fines except those issued pursuant to the first two contempt orders. Pet. App. 83a-89a.

On October 9, 1989, the fifth contempt order was issued, at the motion of the Company, imposing fines of \$6,900,000. Pet. App. 71a-76a.

The sixth, seventh, and eighth contempt orders were entered in November and December, 1989, at the motion of the Company, imposing fines in the amount of \$33,400,000. Pet. App. 55a-68a.

As already noted, in all of these contempt proceedings, the contempts were treated as civil in nature, and the trial judge served as the sole trier of fact, while the Union was denied the various safeguards accorded to defendants in criminal contempt. And, in many instances, the Union was held responsible by the trial judge for violations of his injunctions under circumstances where the perpetrators of the incidents in question were never identified.¹

In total, the trial court levied over \$64,000,000 in fines against the Union.

2. The Union timely noticed appeals of the first five orders to the Virginia Court of Appeals where they were consolidated. ("*Clinchfield I*"). While this appeal was pending, the Company and the Union continued to negotiate to resolve their labor dispute and, on January 1, 1990, announced a full settlement of this dispute with the help of a "super mediator" appointed by the United States Secretary of Labor. The agreement also specifically provided that the parties would dismiss all pending litigation and would have vacated all outstand-

¹ For example, in one instance, even where testimony consisted only of a witness having seen a pair of hands throwing a rock, the Union was fined \$100,000. J.A. 153-155. In many other instances, the Union was held responsible for actions on the sole basis that perpetrators were attired in camouflage clothing, which was treated by the court as a striker "uniform." There are also incidents where unidentified perpetrators were not so attired, and the Union was nonetheless held responsible and fined \$100,000 for each incident. See, e.g., J.A. 80-84, 98-99, 124-127, 135-139, & 190-191.

ing civil judgments, including the contempt fines. Accordingly, on January 24, 1990, the Company and the Union jointly moved the trial court to dismiss the Company's cause and vacate all outstanding contempt fines.

At a hearing held on February 12, 1990, the trial court announced from the bench that it would refuse to vacate the contempt fines at issue, explaining its reasoning in terms of the continuing need to vindicate the court's authority. J.A. 38-61; see also pp. 26-27 & n.12, *infra* (quoting decision). In a letter opinion dated August 22, 1990, which reaffirmed its refusal to vacate the fines, that court amplified its reasoning. Pet. App. 39a-49a; see also p. 27 n.12, *infra* (quoting opinion).

On September 11, 1990, the trial court entered a final order granting the parties' motion to dismiss the Company's civil cause against the Union. Additionally, that court dissolved the injunctions and vacated those fines payable to the Company. However, the trial court also entered a final order refusing to vacate the remaining \$52,000,000 in fines, directing the Union to pay these fines to the clerk of the court, and—in light of the dismissal of the underlying civil cause and the Company's motion to vacate the pending contempt fines—appointing John L. Bagwell as a special commissioner charged with defending and collecting those fines. Pet. App. 50a-52a.

Shortly thereafter, Bagwell moved to intervene in the *Clinchfield I* appeal.

3. Following the September 11, 1990 decision of the trial court, the Union filed a second appeal seeking reversal of, *inter alia*, the sixth, seventh and eighth contempt orders, the order granting in part and denying in part the joint motion to vacate and dismiss, and the order substituting Bagwell as special commissioner. ("*Clinchfield II*").

4. In an opinion and order dated March 26, 1991, the Virginia Court of Appeals decided *Clinchfield I*. The decision denied Bagwell's petition to intervene and ordered

that the fines imposed against the Union under the first five contempt orders be vacated. Pet. App. 34a-37a. The court of appeals—choosing to apply state law, but noting that, on its understanding, the state law parallels the applicable federal law—held that, even if the fines at issue were civil in nature, “civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines.” Pet. App. 36a.

5. Following this decision by the Virginia Court of Appeals, Bagwell, despite the denial of his request for party status, petitioned for appeal to the Supreme Court of Virginia. Specifically, Bagwell sought to appeal both the denial of his petition to intervene and the vacation of the fines in light of the parties’ settlement. The Union opposed the appeal and moved to dismiss. The Virginia Supreme Court deferred consideration of these motions.

On March 5, 1992, the Virginia Supreme Court granted Bagwell an appeal in *Clinchfield I*. At the same time, that court certified *Clinchfield II*, which had been fully briefed and argued and was pending on appeal in the Virginia Court of Appeals. The two cases were then treated as consolidated.

In a decision dated November 6, 1992, the Virginia Supreme Court noted that the Union had appealed the underlying contempt orders, “contend[ing] that the fines are criminal in character and, therefore, are invalid because they were imposed without the mandated constitutional protections.” Pet. App. 12a. That court rejected that contention holding that the fines at issue were not criminal in nature, but rather were civil in nature. Pet. App. 15a-16a.

The Virginia Supreme Court also rejected the Union’s argument that under federal and state law these fines, if civil, must be vacated as a consequence of the full settlement of all disputes between the parties. The court ex-

plained that “[c]ourts of the Commonwealth must have the authority to enforce their orders by employing coercive civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained.” Pet. App. 17a. And the Virginia court granted party status to Bagwell so he could “uphold the validity of the subject fines.” Pet. App. 11a.

On January 8, 1993, the Virginia Supreme Court denied the Union’s petition for rehearing. The Union then timely petitioned this Court for a writ of certiorari. That petition was granted on June 1, 1993.

SUMMARY OF ARGUMENT

A. “Criminal contempt is a crime in the ordinary sense” and “in every fundamental respect.” *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). *Accord*, *United States v. Dixon*, — U.S. —, 61 L.W. 4835 (June 28, 1993). State criminal contempt proceedings must therefore meet the Constitution’s requirements for the trial and punishment of crimes, not simply the requirements for the adjudication of civil matters. Indeed, this Court has emphasized that these criminal procedure protections are of heightened importance in the contempt context, since allegations of “a rejection of judicial authority” may “strike[] at the most vulnerable and human point of a judge’s temperament.” *Bloom*, 391 U.S. at 201-202. *See* pp. 12-13, *infra*.

That being so, a state may not deny a defendant those constitutional protections by characterizing as a civil contempt proceeding that which, in substance, is a criminal contempt proceeding. *See* pp. 14-15, *infra*. The instant case presents two questions that are fundamental to the proper classification of contempt proceedings as civil contempt or as criminal contempt.

First, whether a contempt proceeding may be treated as civil in nature—so that none of the constitutional requirements for a criminal contempt proceeding need be followed—where the defendant is charged with having

taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court substantial and noncompensatory fines, in fixed amounts that the court had established at the time of its initial orders, with the obligation to pay such fines not made subject to any ability of the defendant to purge.

Second, whether a contempt proceeding may be treated as civil in nature when the contempt fines produced by the proceeding are deemed to survive the full settlement of the main civil case, solely in order that the court is able to use those fines to vindicate its own authority.

Both of these questions have been resolved by the prior decisions of this court.

1. As to the first of these questions, this Court has established “a test by which to determine the character of the punishment” and, through that test, to classify the contempt proceeding as civil contempt (and therefore predominantly “remedial” in nature, “for the benefit of the complainant”) or criminal contempt (and therefore predominantly “punitive” in nature, “to vindicate the authority of the court”). *Hicks v. Feoick*, 485 U.S. 624, 631, 633 (1988) (quoting *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 441, 443 (1911)). Under this test, the proper province of civil contempt is confined to the levying of sanctions against a defendant for “refusing to do an act commanded,” or the ordering of compensation. In contrast punishments against a defendant for having “do[ne] an act forbidden,” are the proper province of criminal contempt. *Id.* See pp. 14-16, *infra*. This distinction—which has been recognized for decades in the jurisprudence of this Court—serves the larger interest in confining civil contempt to those situations in which a contempt order is uniquely “remedial,” because the order can directly “undo or remedy” the injury caused by the contempt (by coercing a withheld act or providing compensation), while including in criminal contempt all those

situations in which the sanction, like a normal criminal sanction, “cannot undo or remedy” what has been done, but instead operates as a “punishment or deterrence.” *Hicks*, 485 U.S. at 632-33, 634-35 (quoting *Gompers*, 221 U.S. at 442, 443, and *Shillitanti v. United States*, 384 U.S. 368, 370 n.5 (1966)). See pp. 17-19, *infra*.

Under this Court’s decision in *Hicks* and *Gompers*, the contempt sanctions here—involving unconditional fines, payable to the state, for completed actions that were allegedly violative of a prohibitory order—are the paradigm of *criminal contempt sanctions*. See pp. 20-21, *infra*.

The Virginia Supreme Court attempted to classify the contempt orders in this case as civil by formulating a new test for distinguishing criminal contempt and civil contempt based on whether the judge announces his intended sanction before the allegedly contemptuous conduct, as opposed to after a determination that the court’s prohibitory order has been violated. That distinction is contrary to the law of this Court, and fails to distinguish between contempt proceedings that are *in substance* criminal in nature and proceedings that are *in substance* civil in nature. See pp. 21-25, *infra*.

2. The second of the questions posed by this case is also governed by this Court’s precedents. In *Gompers*, this Court held that sanctions imposed in civil contempt proceedings—which, as just noted, are imposed for the remedial purposes of a civil complainant—“necessarily end[] with the settlement of the main cause of which [the civil contempt proceeding] is a part.” 221 U.S. at 452. See also 221 U.S. at 451 (“When the main case was settled every proceeding which was dependent on it, or a part of it, was also necessarily settled.”). See pp. 27-37, *infra*.

The Virginia courts held that the instant case did not end with the full settlement of all claims by private parties, because that settlement did not account for the public interest in vindicating the authority of the courts.

That rationale is defective in that it intermixes the distinct purposes of criminal contempt and civil contempt, and by so doing, authorizes the use of *civil* contempt to vindicate that public interest which it is the unique purpose of criminal contempt to vindicate. See pp. 25-27, *supra*.

This Court has given full recognition to the needs of the courts to vindicate their authority despite the full settlement of all civil contempt proceedings. The *Gompers* case, while holding that *civil* contempt proceedings are *not* the permissible means of serving these needs, also upholds "the power and right of the court to punish for contempt by . . . a separate and independent proceeding at law for criminal contempt." 221 U.S. at 451. See, pp. 28-29, *infra*.

Because the Virginia courts refused to proceed in this fashion—and, accordingly, denied to petitioners those criminal procedure protections that the Constitution provides—the "civil" contempt sanctions in question must be reversed.

B. In addition to—and conceptually quite separate from—the foregoing questions, this case presents the question of whether the \$52 million of contempt fines at issue here (among the largest contempt judgments ever entered) are excessive under the constitutional prohibitions against excessive penalties.

The court below proceeded on the premise that "civil" and "coercive" contempt fines are *not* subject to the constitutional limits of the Eighth Amendment's Excessive Fines Clause or the Fourteenth Amendment's Due Process Clause. But the logic of the decisions rendered by this Court last Term make clear that those limits *do* apply to such fines. See *Alexander v. United States*, — U.S. —, 61 L.W. 4796 (1993); *Austin v. United States*, — U.S. —, 61 L.W. 4811 (1993); *TXO Production Corp. v. Alliance Resources Corp.*, — U.S. —, 61 L.W. 4766 (1993). Accordingly, the contempt fines at issue—if they are not reversed on the bases discussed

above—should be vacated and remanded for consideration in light of these intervening cases. See pp. 37-40, *infra*.

ARGUMENT

I. THE ISSUES CONCERNING THE CONSTITUTIONAL DISTINCTION BETWEEN CRIMINAL CONTEMPT AND CIVIL CONTEMPT

A. The Imposition of Substantial, Fixed Contempt Fines, Payable to the Court, for the Commission of Acts in Violation of a Prohibitory Order

This Court's decisions make it plain that a contempt proceeding growing out of an underlying private civil case is *criminal* in its nature, and is therefore a proceeding governed by the Constitution's basic criminal procedure requirements, if the contempt order: (1) rests on an adjudication that the defendant has committed a wrong by acting in contravention of a prohibition in the underlying court order, (2) imposes on the defendant, as a sanction for the commission of those acts, a fine that is substantial, determinate, non-compensatory, and payable to the court (or the state), and (3) structures the sanction so that the defendant, once he has acted, can not thereafter purge the contempt.

It is our submission that the contempt proceeding below was just such a proceeding and that the Virginia Supreme Court committed error in determining that the proceeding—which that court characterized as one in civil contempt—was properly tried solely by the judge who issued the underlying prohibitory order, without providing the defendants' basic, constitutionally-mandated criminal procedure protections, most particularly the right to a jury trial.

Given the nature of that submission, we turn first to a demonstration that this Court's well-established decisions do stand for the legal rule stated above. We then consider the Virginia Supreme Court's suggestion for a new and different rule for delimiting criminal contempt, and show that the Virginia Court's rule is not only in conflict

with the rule this Court has followed for over 75 years, but also is plainly inferior to this Court's rule.

1. At the conclusion of the last Term, this Court noted that "It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense.' *Bloom* [v. *Illinois*, 391 U.S. 194], at 201 [(1968)]. *Accord*, *New Orleans v. The Steamship Co.*, 20 Wall. 387, 392 (1874)." *United States v. Dixon*, — U.S. —, 61 L.W. 4835, 4837 (June 28, 1993).² Precisely because criminal contempt is an integral component of the criminal law, the *Dixon* Court added:

We have held that constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions. *See, e.g., Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond a reasonable doubt, and guarantee against self-incrimination); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, and right to present a defense); *In re Oliver*, 333 U.S. 257, 278 (1948) (public trial). We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches. [61 L.W. at 4837].

And, very much to the point here, the holding of *Bloom*, *supra*, is that "The Constitution guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes." 391 U.S. at 199-200.

The reasoning behind this treatment of criminal contempt could not be more straightforward. In the cases

² *Dixon's* reference to "the sort [of criminal contempts that have been] enforced through nonsummary proceedings," is a reference to all criminal contempts other than those committed in the actual presence of the court, so that the judge sees or hears the conduct constituting the contempt. It has always been understood that such direct contempts in the presence of the court call for distinct treatment, and may be dealt with summarily by the judge. *See, e.g., Fed. R. Crim. P. 42(a)*. This case presents no such situation.

cited by *Dixon*, as in many others, this Court has emphasized that "criminal contempt is a crime in every fundamental respect; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom*, 391 U.S. at 201. *See also id.* n.3 (quoting numerous prior cases). As *Bloom* states:

[C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates. [391 U.S. at 201.]³

The *Bloom* Court further explained that the circumstances of criminal contempt present an additional and particularly "compelling argument" for applying the Constitution's criminal due process "protection against the arbitrary exercise of power": viz., "[c]ontemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament," since the conduct alleged "represents a rejection of *judicial* authority." 391 U.S. at 202 (emphasis added). In other words, as this Court has put it, "the power to [punish] for contempt . . . is an 'arbitrary' power which is 'liable to abuse.'" *Id.* (quoting *Ex parte Terry*, 128 U.S. 289, 313 (1888)).⁴

³ This Court's repeated holdings that criminal contempt is "a crime in the ordinary sense," and that criminal contempt proceedings are therefore to be conducted in accord with basic criminal procedures, follows the rule that has been followed throughout most of English legal history. *See Gompers v. United States*, 233 U.S. 604, 610-611 (1914).

⁴ *See also Nye v. United States*, 313 U.S. 33 (1941); *Cooke v. United States*, 267 U.S. 517, 539 (1925); *Ex Parte Hudgings*, 249 U.S. 378 (1919); *Green v. United States*, 356 U.S. 165, 198-199

2. (a) Like the question of the constitutional status of criminal contempt proceedings, the "question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature, for purposes of applying the Due Process Clause and other provisions of the Constitution, is one of long standing, and its principles have been settled at least in their broad outlines for many decades." *Hicks v. Feiock*, 485 U.S. 624, 631 (1988).

The "fundamental proposition" guiding the making of this determination is that "*criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings See, e.g., Gompers [v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911)]*". *Hicks*, 485 U.S. at 632 (emphasis added).

Given this proposition, it follows—as *Gompers* and *Hicks* hold—that a contempt proceeding is a criminal contempt proceeding if it generates a contempt sanction that has every hallmark of a "criminal penalty." And, the Court has emphasized that a *criminal* contempt order is one that, like a normal criminal sentence, serves the interests of "punishment or deterrence," *Hicks*, 485 U.S. at 634-35 (quoting *Shillitani v. United States*, 384 U.S. 368, 370 n.5 (1966)), and does not serve the interests of "undo[ing] or remedy[ing] what has been done nor afford[ing] any compensation" to the complainant, *Hicks*, 485 U.S. at 633 (quoting *Gompers*, 221 U.S. at 442). It is

(1958) (Black, J. dissenting). Cf. *In re Murchison*, 349 U.S. 133, 136-137 (1955):

[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. [Emphasis added.]

such a proceeding that must be conducted in conformity with the constitutional requirements that govern the conduct of criminal proceedings.

In contrast, contempt proceedings that are part of the underlying civil proceedings and generate purely remedial contempt sanctions for the direct benefit of the civil complainant, are *civil* contempt for all constitutional purposes.

In sum, "If [the proceeding] is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Hicks*, 485 U.S. at 631 (quoting *Gompers*, 221 U.S. at 441).

(b) Where the contempt order is unambiguously punitive in its character—or unambiguously remedial—then the proper constitutional classification of the contempt proceeding as criminal or civil is straightforward. Where the order's purpose and effect are less clear cut, the matter assumes a greater complexity. As the *Hicks* Court explained:

Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided. In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both; when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order For these reasons, this Court has judged that conclusions about the purposes for which relief is imposed are properly drawn from an examination of the char-

acter of the relief itself. [*Hicks*, 485 U.S. at 635-36 (emphasis added).]

Accordingly, this Court has cut through the complexity of classifying criminal and civil contempts by recognizing "[t]he distinction between refusing to do an act commanded, —remedied by imprisonment until the party performs the required act; and doing an act forbidden, —punished by imprisonment for a definite term," and the Court has stated that this distinction "is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment." *Hicks*, 485 U.S. at 632-33 (quoting *Gompers*, 221 U.S. at 443).⁵

⁵ The Court has on many occasions reiterated the distinction between "refusing to do an act commanded" (subject to civil contempt) and "doing an act forbidden" (subject only to criminal contempt), see, e.g., *Shillitani*, *supra*, 384 U.S. at 368 (contrasting civil contempt, where "the act of disobedience consisted solely in refusing to do what had been ordered, with criminal contempt, which involves "doing what had been prohibited"); *Penfield v. SEC*, 330 U.S. 585, 590 (1947) (describing civil contempt as the use of "coercive sanctions to compel the contemnor to do what the law has made it his duty to do"); *Doyle v. London Guaranty & Accident Co.*, 204 U.S. 599, 605 (1907) (civil contempt is "the coercion of the opposite party to do some act for the benefit of another party to the action").

Earlier state cases and English common law sources recognized the same distinction. See, e.g., *Phillips v. Welch*, 11 Nev. 187, 190 (1884) ("If the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order If, on the other hand, the contempt consists in a threatened act injurious to the other party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive."); *Wellesley v. Duke of Beaufort*, 2 Russ. & M. 639, 667 (1831) ("the distinction between civil and criminal contempts . . . has been recognized by the Court of the King's Bench The former was the case of non-performance of an award, made a rule of Court, and so might be regarded as technically speaking and in form an offense. But the Court held that as it related simply to a civil matter, and was

(c) This mandatory/prohibitory distinction provides an accurate measure of whether the contempt proceeding is criminal in its nature or civil. Where a defendant has "refus[ed] to do an act commanded," a contempt penalty can directly "undo or remedy" the contempt (by coercing a withheld act). *Hicks*, 485 U.S. at 632-633 (quoting *Gompers*, 221 U.S. at 442, 443).⁶ In contrast, where the defendant has, as an accomplished fact, "do[ne] an act forbidden," a contempt penalty "cannot undo or remedy what has been done." *Id.* Because the wrongful act and any injury the act caused are accomplished facts in the latter case, a contempt penalty operates primarily as "punishment or deterrence," as would a traditional criminal sanction. *Hicks*, 485 U.S. at 634-35 (quoting *Shillitani*, 384 U.S. at 370 n.5).

Moreover, in the former case—where the contempt penalty is directed at compelling the performance of an affirmative act—the penalty can be structured to be of a wholly "conditional nature," so that the defendant "can

rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal but civil"). See also S. Rapalje, *A Treatise on Contempt*, § 21, p. 25 (1884) ("civil contempts are those quasi-contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court"); 1 Daniell, *Chancery Practice*, 464 (2d ed., London, 1845) ("An ordinary contempt in process, as it is a matter merely between the parties, may be cleared by the contemnor doing the act, by the non-performance of which the contempt was incurred, and paying to the other party the costs he has occasioned by his contumacy").

In many ways, this distinction between mandatory orders and prohibitory orders mirrors the familiar distinction between acts and omissions. See *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 192 (1989).

⁶ The *Gompers* Court gave the following illustrations of such civil contempt orders:

If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. [221 U.S. at 442.]

end the [penalty] and discharge himself [from contempt] at any moment by doing what he had previously refused to do." *Hicks*, 485 U.S. at 633 (quoting *Gompers*, 221 U.S. at 442). In this sense, the punitive aspects of the sanction are subordinated to its remedial aspects, since the civil contemnors, even after committing a contempt, "carry the keys of their prison in their own pockets." *Id.* at 633 (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)). See *Shillitani*, 385 U.S. at 370-71 ("The conditional nature of the [sanction]—based entirely upon the contemnor's continued defiance—justifies holding civil contempt proceedings absent the safeguards of indictment and jury.").

(d) Taking all of the foregoing into account, the *Hicks* Court set out "a few straightforward rules" for determining whether a contempt order is criminal or civil:

If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. [485 U.S. at 631-632 (quoting *Gompers*, 221 U.S. at 442; emphasis added).]

And, the particular rule that *Hicks* stated with respect to contempt fines—that a noncompensatory fine of a determinate nature, made payable to the court, is a "punitive" or "criminal" sanction—is a rule that the Court has followed for more than a century. See e.g., *Penfield Co. v. SEC*, 330 U.S. 585, 594 (1947) ("[w]hen the court imposes a fine [payable to the court] as a penalty, it is punishing yesterday's contemptuous conduct" and therefore imposing a criminal sanction); *Nye v. United States*, 313 U.S. 33,

43 (1941) (an order that "imposes unconditional fines payable to the United States . . . awards no relief to a private suitor" and is therefore criminal); *Union Tool Co. v. Wilson*, 259 U.S. 107, 109-110 (1922) (unconditional and noncompensatory fine payable to court treated as punitive in nature); *Re Merchants' Stock & Grain Co.*, 223 U.S. 639, 640-642 (1912) (same); *Re Christensen Engineering Co.*, 194 U.S. 457, 461 (1904) (same); *New Orleans v. The Steamship Co.*, 20 Wall. 387 (1874) (same).⁷

⁷ Despite the lengthy exposition of these legal principles in *Hicks*, the Virginia Supreme Court suggested that this Court, in *United States v. United Mine Workers*, 330 U.S. 258 (1947), authorized the use of "coercive" civil contempt sanctions in the context of a prohibitory injunction, and thereby abandoned the mandatory/prohibitory distinction articulated in *Gompers*. This suggestion is doubly flawed.

First, the Virginia court's reading of the *Mine Workers* opinion flies in the face of the *Hicks* opinion. *Hicks*, as we have shown, treats *Gompers* as authoritative in this regard and does not so much as suggest that *Mine Workers* varies *Gompers* in any way.

Second, an examination of this Court's opinion in *Mine Workers* reveals that it does rest on and apply the principles set out in *Gompers*. At the time the coercive civil contempt fines at issue in *Mine Workers* were imposed, the United Mine Workers were in violation of a trial court's orders requiring the Union to take certain steps toward bringing about the cessation of an unlawful strike. This Court read those orders as imposing on the Union the obligation to take the following discrete, affirmative acts, the doing of which would avoid the imposition of the fines:

[1] by withdrawing unconditionally the notice given by it, signed John L. Lewis, President, on November 15, 1946, to J.A. Krug, Secretary of the Interior, terminating the Krug-Lewis agreement as of twelve o'clock midnight, Wednesday, November 20, 1946, and [2] by notifying, at the same time, its members of such withdrawal in substantially the same manner as the members of the defendant union were notified of the notice to the Secretary of the Interior above-mentioned; and [3] by withdrawing and similarly instructing the members of the defendant union of the withdrawal of any other notice to the effect that the Krug-Lewis agreement is not in

(e) The contempt orders here have each and every one of the *Gompers-Hicks* hallmarks of a "criminal penalt[y]," *Hicks*, 485 U.S. at 632:

First, the contempt proceedings, and the contempt punishments, were for violations of prohibitory orders, so that the contempts alleged, and the injuries allegedly caused, were treated as accomplished facts.⁸

Second, the contempt punishments took the form of determinate fines, payable to the court, in amounts (totaling \$52 million) that do not even purport to have any relation to any costs or injuries caused by the contempts, so that the fines are wholly noncompensatory in their nature.⁹

Third, the punishments were structured as determinate fines, fixed in amount once a contempt had been found, not as punishments that the defendants, once held to be in contempt, could purge.¹⁰

full force and effect until the final determination of the basic issues arising under the said agreement. [330 U.S. at 305.]

Thus, this Court made clear that the United Mine Workers and its officers were *not* subject to a broad prohibitory order—*e.g.*, do not strike—but rather to a mandatory order requiring that the Union and its officers undertake to perform the enumerated, discrete, affirmative acts (set out above). The *Mine Workers* Court thus treated the contempt proceeding there as one to secure compliance with a mandatory order that is properly classified as civil under *Gompers*.

⁸ See *Hicks*, 485 U.S. at 632-33 (emphasizing "[t]he distinction between refusing to do an act commanded . . . and doing an act forbidden"; quoting *Gompers*). See generally pp. 16-18, *supra*.

⁹ See *Hicks*, 485 U.S. at 631-32 (a fine "is remedial when it is paid to the complainant, and punitive when it is paid to the court"). See generally pp. 18-19, *supra*.

¹⁰ See *Hicks*, 485 U.S. at 631-32 (a fine payable to the court may be "remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order"; *id.*, at 633 (civil contempt defendant "can end the [sanction] and

In sum, the contempt fines at issue in this case most assuredly constitute "criminal penalties," as this Court defined that term in *Hicks*. See 485 U.S. at 632.¹¹

3. Against all of the foregoing, the Virginia Supreme Court set up the following alternative approach to distinguishing criminal contempt from civil contempt: where a court issues an order that sets out a prohibition against engaging in certain conduct (and does not set out the specific penalty that will be imposed in the event of a violation), and the defendant thereafter violates that prohibition, the court may *only* impose a penalty in *criminal* contempt; in contrast, where a court issues an order that sets out *both* a prohibition against engaging in certain conduct and a specified penalty in the event of a violation, and the defendant thereafter violates that prohibition, the court may impose the specified penalty in *civil contempt*, even if the penalty is otherwise indistinguishable from a traditional criminal penalty. See Pet. App.

discharge himself at any moment by doing what he had previously refused to do"); *id.* (civil contempt defendants "carry the keys of their prison in their own pockets"); *Shillitani*, 384 U.S. at 370-71 ("[t]he conditional nature of the [sanction]" justifies its characterization as civil contempt). See generally, pp. 17-18, *supra*.

¹¹ We also note the explicit statement of the trial court that these contempt fines were imposed, in large part, not as a remedy running to the complainants, but as a deterrent sanction imposed to "protect[] the rights of . . . the general public as well" (Pet. App. 44a; see also *id.* at 45a), and to vindicate the public authority of the court (J.A. 55-58; see note 12, *infra*). These interests, of course, are the very interests that, according to *Hicks* and *Gompers*, are to be vindicated through the use of *criminal* contempt, not civil contempt. See *Hicks*, 485 U.S. at 631 ("If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.") (quoting *Gompers*, 221 U.S. at 441). See also *Gompers*, 221 U.S. at 441, 445 (a civil contempt order is "not to vindicate the authority of the law" and has "nothing in the nature of a . . . judgment imposed for public purposes"). See generally, pp. 14-15, *supra*, and pp. 29-30, 33 & 36-37, *infra*.

15a. The Virginia court's scheduled penalty/unscheduled penalty dichotomy cannot withstand reasoned scrutiny.

(a) The Virginia Supreme Court's approach is *not* generated by, and does *not* provide, any basis for distinguishing criminal contempt from civil contempt that is grounded in the history or the logic of contempt law, or in the history or logic of the criminal law and the civil law in general.

History teaches that the imposition of previously stated penalties for the violation of previously stated prohibitions is as much the province of the criminal law as the imposition of previously unstated penalties. The law of crimes has historically been, and remains generally, a law of stated prohibitions against wrongful actions, coupled with stated noncompensatory penalties (imprisonment, fine, or forfeiture) for violations of these prohibitions. *See, e.g.,* W. LaFave & A. Scott, Jr., *Criminal Law* § 3.3 (2d ed. 1986); 1 P. Robinson, *Criminal Law Defenses* § 86(a) (1984).

Since this Court's decisions teach that the province of criminal law generally is the province of criminal contempt, a contempt proceeding that results from such actions and provides such penalties must provide the safeguards that the Constitution mandates for criminal proceedings. *E.g., Bloom*, 391 U.S. at 201. Very simply stated, a contempt proceeding that imposes on the defendant scheduled, determinate, noncompensatory fines, payable to the court, for the defendant's violation of a previously issued prohibitory injunction is a proceeding that, in all relevant respects, is *indistinguishable from a traditional criminal proceeding*. The fact that the fines were scheduled in advance does not alter the identity between the contempt proceeding and other criminal proceedings one whit.

(b) Under the *Gompers-Hicks* framework, fines and imprisonment are imposed through civil contempt proceedings only in a narrow class of situations that is different in kind from the class of situations tried through

criminal proceedings. The scheduled penalty/unscheduled penalty dichotomy that was adopted by the courts below does not establish any such line of demarcation, and, as a result, fails in its function: to allocate to the criminal contempt domain all the contempt proceedings that are in substance criminal proceedings.

In *Mine Workers*, *supra*, this Court observed that civil contempt sanctions may be directed at either of two ends: "[1] to coerce the defendant into compliance with the court's order, and [2] to compensate the complainant for losses sustained." 330 U.S. at 303-304. The Virginia Supreme Court did not purport to hold, and respondent does not urge, that the fines at issue here—which are payable to the court in amounts unrelated to any losses the complainant incurred—are "to compensate the complainant for losses sustained." Rather, the court below sought to fit these fines within the category of "coercive" civil contempt sanctions, a category that in this Court's jurisprudence has been limited to sanctions designed to secure the performance of previously ordered affirmative acts. *See pp. 16-19, supra*.

As this Court has recognized, the term "coercive" in its most general sense includes virtually all civil contempt sanctions as well as all criminal contempt sanctions. *See, e.g., Hicks*, 485 U.S. 635-636; *Gompers*, 221 U.S. 443; *Bessette v. W. B. Conkey*, 194 U.S. 324, 326 (1904). That is so because the imposition of any sanction for disobedience—including a sanction that is retributive and punitive—"tends to prevent a repetition of the disobedience." *Hicks*, 485 U.S. at 635-636 (*quoting Gompers*, 221 U.S. at 443). Thus, the term "coercive," when used to differentiate *civil* contempt sanctions from *criminal* contempt sanctions, —if it is to have any differentiating content at all—must denote some effect other than simply "tend[ing] to prevent a repetition of the disobedience." The *Gompers-Hicks* prohibitory/mandatory dichotomy provides that content.

If a court threatens to impose sanctions for a possible future violation of a *prohibitory* order, the threatened sanction “coerces” compliance in the sense—and only in the sense—that all stated legal norms with stated penalties for violation *coerce* compliance: the coercion takes the form of deterring wrongful conduct by defining that conduct as wrongful and by threatening punishment for any future violation. And, in this circumstance, the only sense in which a defendant controls his own destiny with respect to the imposition of sanctions—*viz.*, the only sense in which he “carries the keys of his prison in his own pocket,” *Hicks*, 485 U.S. at 633 (*quoting In re Nevitt*, 117 Fed. at 461)—is the sense in which any member of the general public can avoid criminal law sanctions: by conducting himself so as not to violate the prohibitions of the criminal laws.

In contrast, when the underlying injunction is *mandatory*, a conditional penalty for the failure to take the required act *does* have a “coercive” effect that is different in kind. The sanction in the mandatory injunction context is *entirely prospective* in its orientation, and is focused solely on securing a benefit *for the complainant*. Precisely for that reason, once the defendant has performed the required act, the defendant’s civil contempt is deemed to be fully purged, despite the prior disobedience. This kind of purely prospective and remedial coercion is alien to the criminal law. Equally to the point, the nature of mandatory injunctions minimizes the dangers of judicial abuse. The defendant may at any time bring an end to the sanctions (and purge himself of contempt) simply by performing the discrete, required act. *See Shillitani, supra*, 384 U.S. at 370-371.

(c) As the foregoing would lead one to expect, the Virginia Supreme Court’s proposed rule has the potential to shrink criminal contempt to the verge of invisibility. To avoid the inconvenience of meeting the Constitution’s requirements for criminal cases, all that a trial judge need

do is announce in advance that, if his prohibitory order is violated, he will impose a punitive fine or a jail sentence. Doing so, under the proposed rule, would transform any such sanction imposed for subsequent disobedience into a *civil* contempt sanction. Given the significant procedural protections the Constitution provides to a defendant in a criminal proceeding, there is every reason to believe that if complainants and trial courts can secure all the benefits of criminal punishments while dispensing with the constitutional prerequisites of a criminal proceeding, that will be their preferred course.

In short, the Virginia Supreme Court’s rule for classifying contempt proceedings as criminal or civil can not be squared with this Court’s rules and is fatally flawed in its own terms. That in itself is sufficient to require reversal of the decision below; but, as we now show, there is far more.

B. The Continued Prosecution of “Civil” Contempt Orders by a Court-Appointed Officer After the Full and Final Settlement of the Main Civil Action

This Court’s decisions establish that a contempt proceeding cannot *first* be tried through “civil” contempt procedures *and then* be held to generate contempt sanctions that are beyond the capacity of the private civil parties to terminate through a settlement. In this regard, as in the regard already canvassed, *Gompers, supra*, is the governing precedent. And, since the Virginia Supreme Court held to the contrary, *Gompers* requires reversal of the decision below on this added ground.

1. The contempt proceedings here were instituted at the motion of—and were prosecuted by—private civil complainants; were styled by the trial court as part of those complainants’ preexisting civil litigation against the defendants; and were treated by the trial court as civil proceedings ancillary to the preexisting civil litigation. Indeed, the trial court repeatedly rejected defendants’ claims that the proceedings were criminal in character.

Nevertheless, the trial court *denied* the private civil parties' joint motion—submitted on the full settlement of all civil disputes between them—to terminate these “civil” proceedings and to vacate these “remedial” and “civil” fines.

Instead, the trial court responded to the joint motion and settlement by appointing an individual who previously had not been involved in any way in the litigation to serve as a “special commissioner,” and by charging that individual with an independent duty to the court to defend the contempt judgments on appeal and to prosecute any further proceedings necessary for the collection of all accumulated contempt fines.

In so doing, the trial court, by its own admission, was *not* seeking to vindicate *any remedial interests of a private litigant* (since all the civil litigants in the underlying action had relinquished all such interests through their settlement and joint motion to terminate the proceedings). Indeed, the trial court made it clear that the special commissioner was appointed precisely because there was no longer any existing interest of a private litigant in the further enforcement of the contempt fines. Of equal importance, that court justified its actions as necessary to the public's interest in vindicating the authority of the courts.¹²

¹² According to the trial court, to allow the contempt proceeding to be terminated by private settlement would be to allow a litigant who had violated judicial orders, and had thereby undermined judicial authority and public order, to escape punishment:

[E]very time there is a willful violation of the Court's Order, it is an affront to the authority and the dignity of the power, if you will, of this Court and to the people in this community. It is an eating or tearing down of this Court's power to administer the law. And this Court is convinced . . . all Courts are vested with the power and charged with the duty of enforcing [their] Decrees, regardless of the purpose that the Decrees are put down for. Because those Decrees are mandates of law

Following the trial court's lead, the Virginia Supreme Court reasoned that, regardless of the interests or wishes of the private civil parties, the “[c]ourts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained.” Pet. App. 17a.

2. (a) The *Gompers* case—as we have noted—involved a challenge to a contempt order that imposed a term of imprisonment and a monetary obligation on a group of labor leaders at the motion of a company that

. . . the Court must have the power to enforce those mandates if organized society is to be maintained.

. . . [T]he collection of these fines [is] the Court's solemn duty . . . not only to ensure the rights of the private parties, but also to ensure the rule of law. And although it is certainly relevant to the Court's consideration that the parties in the civil suit have come to an agreement with regard to their interests and have asked the Court to vacate or suspend, what have you, all of the penalties that have been assessed, their agreement is not controlling on this Court.

. . . [T]he Court is convinced that although . . . [a] particular agreement may very well satisfy the economic needs of the parties, it does not speak to the interest of this Court. . . . [T]he Court must be sure that . . . all parties must know and understand that Courts are not pieces on a game board to be manipulated and used by the players as they will. [J.A. 55-57.]

In a subsequent opinion, the trial court justified its position that the parties did not have the right to settle all claims on the basis that the court had *initially* imposed the contempt fines, not only to vindicate the remedial needs of the private complainants, but also to vindicate the *public* interest in public order and obedience to law. See Pet. App. 44a (“as the strike proceeded, the protection . . . granted by the Court was more and more for the general public . . . protecting the rights not only of the litigants, but the general public as well”); *id.* at 45a (“From its institution, and more as it proceeded, this case has involved the protection of the rights of the general public in addition to those of the plaintiffs.”). This *public* interest, the court explained, could not be relinquished by private settlement. See Pet. App. 47a.

had brought a civil action against those leaders and their labor organization for conducting an unlawful labor boycott. The company had obtained an injunction against the boycott, the labor leaders were charged by the company with violating the injunction, and the company sought relief for such violations through civil contempt. The trial court held the defendants in contempt and imposed contempt penalties, but before the penalties were actually enforced, the civil litigants in *Gompers*—like the civil litigants here—reached a full settlement of the underlying litigation between them. See 221 U.S. at 451.

On these facts, this Court ordered the dismissal of all outstanding civil contempt sanctions and the termination of all further civil contempt proceedings. The *Gompers* Court explained that: “When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled.” 221 U.S. at 451 (emphasis added). Thus, any proceeding to enforce previously imposed civil contempt penalties “necessarily ended with the settlement of the main cause of which it is a part.” *Id.* at 452.

Equally to the point, the *Gompers* Court was at pains to make it clear that the determination that a contempt proceeding survives private settlement—so that it may be independently pursued by the court for the vindication of public purposes—is a determination that marks a *defining distinction* between criminal contempt and civil contempt. While the *civil* contempt proceeding at issue in *Gompers* “necessarily ended” with settlement, the Court was quick to add that

If [the contempt proceeding] had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity

cause made in their private litigation. [221 U.S. at 451 (internal citations omitted).] ¹³

(b) A civil contempt proceeding, as *Gompers* put it, is a form of civil remedy in an underlying civil case; it is “not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.” 221 U.S. at 442. Because it is “remedial”, a civil con-

¹³ In both regards, *Gompers* is firmly grounded in this Court’s prior decision and in the common law.

This Court had previously held, in *Worden v. Searls*, 121 U.S. 27 (1887), that an outstanding *civil* contempt fine for violation of a court order must be dismissed whenever the complainant no longer has a legitimate remedial interest in its enforcement. In *Worden*, the Court dismissed proceedings to enforce outstanding civil contempt fines because the legal theory of complainants’ underlying case was rejected on appeal. But the *Worden* court specified that—since the “injunction was in full force” at the time of the violation—the dismissal of the civil case should be “without prejudice to the power and right of the court to punish the contempt . . . by a proper [criminal] procedure.” *Id.* See *Gompers*, 221 U.S. at 451 (citing *Worden*).

The common law sources also recognize the right of a party to settle civil contempt orders, but not criminal contempt orders. See *Seaward v. Patterson*, 1 Ch. 545, 556 (1897) (“In [civil contempt] the person who is interested in enforcing the order enforces it for his own benefit; in [criminal contempt], if the order of the court has been contumaciously set at naught, the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act” (emphasis added)); 4 Blackstone, *Commentaries on the Laws of England*, 391 (1769) (discussing the power of the crown to pardon for criminal contempts, but noting that “where private justice is principally concerned in the prosecution of offenders . . . in appeals of all kinds (which are the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardon”) (emphasis added)). See generally Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 170 (1908) (“a waiver of the terms of the decree by the other party to the suit put an end to the imprisonment for [civil] contempt”); 1 Daniell, *Chancery Practice* 464-470 (2nd ed., London, 1845) (discussing waiver of civil contempt in traditional equity courts).

tempt proceeding is "instituted, entitled, tried, and up to the moment of sentence, treated as a part of the original cause in equity." *Id.* at 445. In such a proceeding, the civil complainant is "not only the nominal, but the actual party on the one side, with the defendants on the other." *Id.* As "[t]here is nothing in the nature of a criminal suit or judgment imposed for public purposes" in such a proceeding, the complainant is acting "in its own right in an equity cause, and not as a representative of the [government] prosecuting a case of criminal contempt." *Id.* Accordingly, as *Gompers* held, each civil contempt order "necessarily end[s] with the settlement of the main cause of which it is a part." *Id.* at 452.

A criminal contempt proceeding, in contrast, is a proceeding "to vindicate the authority of the court." *Gompers*, 221 U.S. at 442. As such, it is normally treated as "a separate action, one personal to the defendants, with the defendants on one side and the court vindicating its authority on the other." *Id.* at 445 (quoting the *Gompers* court of appeals decision). The interests at stake are *not* simply the private interests of a civil complainant but the *public* interest in the vindication of public authority, for which the court, not any private litigant, has primary responsibility. *Id.* Accordingly, a criminal contempt proceeding—like any other *criminal* proceeding, and wholly unlike any private *civil* proceeding—"could not in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation." *Id.* at 451.¹⁴

¹⁴ The reasoning of the *Gompers* decision, like its holding, is firmly grounded in this Court's prior decisions and the relevant common law authorities.

This Court had previously recognized that the purposes of civil contempt proceedings and criminal contempt proceedings were wholly distinct, with the former having the status of a *remedial* proceeding in which a civil litigant is vindicating his private interests with respect to a private wrong, and with the latter having the status of a *punitive* proceeding in which the court itself is

(c) To be sure, *Gompers* recognized that the same conduct can give rise to both civil and criminal contempt liability, and that a proceeding for either kind of contempt may have the "incidental effect" of partially serving the purposes of the other. 221 U.S. at 443. But *Gompers* emphasized that the distinction between civil contempt proceedings and criminal contempt proceedings "involve[s] substantial rights and constitutional privileges." *Id.* at 444. *Gompers*, therefore, holds that the character of a contempt sanction must correspond to the civil nature or criminal nature of the proceedings which generated the sanction. *Id.* To allow civil proceedings to generate sanctions that are of a criminal character, *Gompers* explained, would be to allow "a departure—a variance—between the procedure adopted and the punishment imposed" that would be "as fundamentally erroneous as if . . . an action of 'A vs. B, for assault and battery,' [generated a] judgment . . . that the defendant be confined in prison for twelve months." *Id.* at 449.

The decision below constitutes just such "a departure" from, or "variance" between, the procedures used and the punishments imposed. The trial court first insisted, throughout the contempt proceedings, that *only* civil contempts were at issue, and denied to the defendants the procedural safeguards, such as trial by jury, that the Constitu-

vindicating its own public authority in response to the public crime of contempt. See, e.g., *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599, 604-605 (1907); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 328 (1904) (quoting *In re Nevitt*, 117 Fed. 448, 458 (8th Cir. 1902)). See also *Worden v. Searls*, *supra*; *Re Christensen Engineering Co.*, 194 U.S. 458 (1904).

The relevant common law authorities were to the same effect. See, e.g., *King v. Myers*, 1 Durn. E. 265, 266 (K.B. 1786) (unlike criminal contempt, civil contempt is "only in the nature of a civil execution"); *King v. Edwards*, 9 B. & C. 651, 652 (1829) (civil contempt is "in the nature of civil process"); 1 Daniell, *supra*, at 464 (civil contempt proceeding is "a matter merely between the parties"). 2 Daniell, *supra*, at 1020 ("process of contempt" was normal means of civil enforcement in equity courts).

tion mandates in criminal proceedings. That court then insisted that its "civil" contempt orders be clothed with the precise attribute that *Gompers* holds is unique to criminal contempt orders—viz., the capacity to survive a full private settlement—so that the *public* interest in vindication of the court's authority would be served. See pp. 26-27 & n.12, *supra*.

Indeed, in order to vindicate this public interest—after the full settlement by the private parties of all private disputes—the trial court was compelled to radically redesign the very structure of the litigation. In essence, that court abandoned the normal structure of civil litigation. By appointing a stranger to the litigation to take over the case as a "special commissioner," and by charging that individual with prosecuting the defendants as a representative of the court, the trial court adopted the structure which *Gompers* recognizes as the norm in criminal contempt litigation.¹⁵

In all of these regards, the decision below is contrary to *Gompers* and for that reason must be reversed.

(d) The trial court, the Virginia Supreme Court, and respondent Bagwell, have so far attempted to distinguish *Gompers* on the basis that the monetary contempt sanction at issue there (a "compensatory" fine "to be paid to

¹⁵ See *Gompers*, 221 U.S. at 445 (criminal contempt is a "separate" proceeding "with the defendants on one side and the court vindicating its authority on the other").

This Court has recently noted that, in the context of *criminal* contempt, the practice followed by the trial judge in this case is a normal and acceptable practice. See *Young v. Vuitton*, 481 U.S. 787 (1987) (judge appointed a private attorney to prosecute a criminal contempt, on behalf of the judge, against a party who committed contempt in the course of a separate civil case).

In contrast, within the confines of civil litigation, it is neither normal nor generally accepted for judges to appoint private individuals to act on their behalf in pursuing litigation goals beyond those that the civil parties choose to litigate. See *Webster Eisenlohr v. Kalodner*, 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945).

the complainant") was "remedial" in nature, while the instant contempt sanction (a "coercive, civil" fine to be paid to the court) is a civil sanction that, because it is "coercive," may be enforced purely in order to vindicate the authority of the court, independent of any "remedial" interest of the private civil litigants. See Pet. App. 18a; Opp. Br. 27-28.

This argument fundamentally mischaracterizes the *Gompers* decision. The *Gompers* Court determined that settlement between the parties terminates *all* civil contempt proceedings because such proceedings are—and must be—"remedial" proceedings, in which *all* sanctions are issued "for the benefit of the complainant"; civil contempt proceedings are *not*—and *cannot be*—proceedings in which individuals face punitive sanctions "to vindicate the authority of the court." 221 U.S. at 441. Indeed, the *Gompers* court made it quite clear that the distinction obtains where the civil contempt remedy is "coercive" and where it is "compensatory." As *Gompers* put it, a "coercive" civil contempt order is "not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do" and thereby to benefit the civil complainant. *Id.* at 44.

3. In the years since *Gompers*, the aspects of *Gompers* relevant here have been repeatedly applied, reaffirmed, and, in one significant respect, expanded.

(a) *Gompers*' basic premises—that civil contempt proceedings are remedial proceedings; that civil contempt orders are remedial orders; that such proceedings (and orders) are thus for the private benefit of the civil complainant; and that such proceedings (and orders) are therefore distinct from criminal contempt proceedings (and orders) which are designed to vindicate the public authority of the law and the courts—have remained at the center of this Court's jurisprudence.¹⁶

¹⁶ See *Hicks v. Feoick*, *supra*, 485 U.S. at 631-632 (A "critical feature" of the distinction between civil and criminal contempt is

(b) This Court has also repeatedly recognized the related proposition that a civil contempt proceeding is to be treated as a part of the underlying civil litigation (since it is merely a remedial proceeding ancillary to the main civil case), while a criminal contempt proceeding is to be treated as a distinct dispute between the defendant and the court itself.¹⁷

that in "civil contempt the punishment is remedial, and for the benefit of the complainant," while in "criminal contempt the sentence is punitive, to vindicate the authority of the court The Court has consistently applied these principles." (*citing Gompers*)); *Shillitani v. United States*, 384 U.S. 364, 368 (1966) (a court's imposition of contempt "is essentially a civil remedy designed for the benefit of other parties"); *Penfield v. SEC*, 330 U.S. 585, 590 (1947) (punishment for civil contempt "is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public" . . . [it is] then employed not "to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do" (*citing Gompers*)); *McCrone v. United States*, 307 U.S. 61, 64 (1939) ("a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of complainant, and is not intended as a deterrent to offenses against the public" (*citing Gompers*)); *Ex Parte Grossman*, 267 U.S. 87, 111 (1925) ("For civil contempts, the punishment is remedial and for the benefit of the complainant . . . [f]or criminal contempts, the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions." (*citing Gompers*)); *Terminal Railroad Assoc. v. United States*, 266 U.S. 17, 27 (1924) (where contempt "proceedings were instituted by [private complainants], not to vindicate the authority of the court, but to enforce rights claimed by them under the original decree . . . [t]he controversy is between [the civil parties, and the] . . . nature of the proceedings is civil and remedial, not criminal" (*citing Gompers*)); *Re Merchants' Stock & Grain Co.*, 223 U.S. 639, 641 (1912) (contempt is "deemed [civil and] remedial when its purpose is to indemnify the injured suitor, or coercively to secure obedience to a mandate in his behalf, and is deemed [criminal and] punitive when its purpose is to vindicate the authority of the court by punishing the act of disobedience as a public wrong" (*citing Gompers*)).

¹⁷ See, e.g., *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932) ("proceeding for civil contempt for violation of

(c) Given this continued adherence to *Gompers'* premises, it should be no surprise that *Gompers'* holding regarding settlements has also been reaffirmed. Thus, in *Leman v. Krentler-Arnold Hinge Last Co.*, *supra*, this Court restated at some length, and then endorsed, *Gompers'* settlement rules:

The question of the relation of [a civil contempt] proceeding to the main suit was fully considered in the case of *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, and it was determined that the [civil contempt] proceeding was not to be regarded as an independent one, but as a part of the original cause The distinction was made in this respect between such proceedings and those at law for criminal contempt which "are between the public and the defendant, and are not a part of the original cause." In the *Gompers* Case . . . as there had been a complete settlement of all matters involved in the equity suit, the contempt proceeding was necessarily ended. [284 U.S. at 452-53.]

And, in *Mine Workers*, *supra*, this Court again cited *Gompers'* settlement rules with approval. See 330 U.S. at 295 n. 61. As *Mine Workers* puts it,

The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worden v. Searls*, *supra*, at 25, 26 In accord in the case of settlement is *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 451-2 (1911): ". . . when

the injunction should be treated as a part of the main cause"); *Oriel v. Russell*, 278 U.S. 358, 363 (1929) ("civil contempt . . . is to be treated as a mere step in the [underlying] proceedings"); *Michaelson v. United States*, 266 U.S. 42, 64-65, 67 (1924) ("the proceeding for criminal contempt, unlike that for civil contempt, is between the public and the defendant, [and] is an independent proceeding at law, and no part of the original cause" (*citing Gompers*)); *Re Merchants' Stock & Grain Co.*, *supra*, 223 U.S. at 641-42 (a civil contempt order as a "remedial" order is "merely interlocutory").

the main cause was terminated . . . between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character." [*Id.* (ellipses within *Gompers* quotation appear in *Mine Workers*)].¹⁸

(d) Indeed, in one highly significant respect, the trend since *Gompers* has been to substantially strengthen the doctrinal premises that underlie the *Gompers* settlement rules.

This Court has placed an increasing emphasis on the importance of ensuring that, if civil procedures are used to generate a contempt order, *no aspect* of the contempt order may serve uniquely punitive purposes. The Court has thus made explicit that "where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review." *Penfield Co. v. SEC*, *supra*, 330 U.S. at 591.¹⁹

¹⁸ The Court also followed the logic of *Gompers* in *Shillitani*, *supra*, in holding that an imprisonment for civil contempt—imposed in order to coerce an individual into giving grand jury testimony—must end whenever the remedial need for such an imprisonment ends, *viz.*, when the term of the relevant grand jury ends. 384 U.S. at 370-371. *Shillitani* reached this result despite the fact that the imprisonment order was for a fixed term (although with a purge clause) and the fixed prison term had not ended (nor had the contemnor complied with the order) prior to the expiration of the grand jury. Relying on a principle that would be equally applicable in explaining *Gompers*' settlement rules, the Court stated that in enforcing civil contempt orders "a court must exercise '[t]he least possible power adequate to the end proposed.' *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821); *In re Michael*, 326 U.S. 224, 227 (1945)." *Shillitani*, 384 U.S. at 371.

¹⁹ See *Hicks*, *supra*, 485 U.S. at 638 ("if both civil and criminal relief are imposed in the same proceeding, then the criminal feature of the order is dominant and fixes its character for purposes of review"); *Nye v. United States*, 313 U.S. 33, 42-43 (1941) (same);

The contempt orders in the instant case contain an element that is indisputably punitive, the capacity to survive a full civil settlement in which the complainant relinquishes all remedial interests. This element is wholly unrelated to the remedial interests of the civil complainant and serves *only* to vindicate public authority. Accordingly, these contempt orders must be deemed criminal in nature. And, given that these orders grow out of civil proceedings—in which basic constitutional protections due in criminal proceedings were not granted—these orders cannot stand.

II. THE EXCESSIVE FINES ISSUES

The "civil" contempt fines of \$52 million that have been made payable to the court in this case are—assuming the fines are properly considered "civil"—among the largest civil contempt fines ever levied.²⁰ Those fines do not rest on any claim of compensatory damages, or, indeed, on any current claim of any kind by any of the private parties to the underlying civil litigation.

The trial judge, in levying the fines, provided no rationale for the schedule of fines he announced and followed.

McCrone v. United States, *supra*, 307 U.S. at 64 (civil contempt punishment "is wholly remedial, serves *only* the purposes of the complainant, and is *not* intended as a deterrent to offenses against the public" (emphasis added)); *Farmers & Mechanics National Bank v. Wilkinson*, 266 U.S. 503, 506 (1925) ("order [that is] part punitive, takes character from its criminal feature"); *Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1922) ("[w]here a fine is imposed . . . partly as punishment, the criminal feature of the order is dominant"); *Re Merchants' Stock & Grain Co.*, *supra*, 223 U.S. at 641 (same). See also *Re Christensen Engineering Co.*, 194 U.S. 458 (1904).

²⁰ We have examined all cases classified under the West Key Number System as Contempt 75 (Amount of Fine) and discovered no case imposing a civil contempt sanction equal to or in excess of \$52 million. We have been informed by the United States Department of Justice that the United States does not compile statistics related to the amounts of civil contempt fines, and is not aware of any other entity which might do so.

See Pet. App. 111a. The amount of the fines that he scheduled for particular acts did not even purport to be in any way calibrated to the harm caused. Nor was the schedule derived from any legislative determination with respect to the appropriate penalty for the covered act. Moreover, the judge imposed the scheduled fines mechanically, without regard for the severity of, or the consequences which flowed from, any particular cited action.

In rejecting the Union's argument that the fines imposed were excessive as a matter of federal constitutional law, the Virginia Supreme Court's major premise was that the law of this Court regarding the constitutional limitations on excessive fines "has nothing to do with coercive, civil fines imposed for contempt of court." Pet. App. 18a. The Virginia court then dismissed all of petitioners' excessive fines claims in four sentences and without making any effort at establishing any relationship between the schedule of fines at issue and any specific harms caused. Pet. App. 18a-19a. Rather, the Virginia court justified the fines—without discussing what source of law or legal standard it was applying—on the basis that the coercive civil fines here are justified by the extent of the Union's resources and the fines' purpose to vindicate the trial court's authority and the "rule of law" under the circumstances. *Id.*

This disposition of petitioners' excessive fines claims is contrary to this Court's recent decisions, and the judgment below, if not reversed on the bases already presented, should thus be vacated and remanded in light of those decisions.

1. "The Excessive Fines Clause [of the Eighth Amendment] limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, — U.S. —, 61 L.W. 4811, 4813 (1993) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S.

257, 265 n.6 (1989) ("at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to the sovereign as punishment for some offense")). Accord *Alexander v. United States*, — U.S. —, 61 L.W. 4796, 4799-4800 (1993). And, this Court's prior precedents make unmistakably clear that a sanction—regardless of whether the court imposing that sanction calls it "civil" in nature or "criminal"—"is punishment as we have understood that term" if the sanction "cannot be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *United States v. Halper*, 490 U.S. 435, 448 (1989) (emphasis added). See also *Austin*, *supra*, 61 L.W. at 4815 n.12 & 4816 (citing and quoting *Halper*).

The "civil" contempt fines at issue here indisputably serve "retributive [and] deterrent purposes." Indeed, both the trial court and the Virginia Supreme Court expressly invoked such purposes to justify their refusal to dismiss the fines at issue on the full settlement of all the parties' civil claims. See, e.g., Pet. App. 17a, 44a-45a; J.A. 55-58. See also pp. 26-27 & n.12, *supra*. Whatever may be the import of their retributive and deterrent design for purposes of assessing their validity as *civil* contempt sanctions, see pp. 21 n.11 & 25-37, *supra*, it follows inexorably from this Court's decisions regarding the meaning of "punishment" that these fines *are* punishment for purposes of the Eighth Amendment. All this being so, the court below was in error in its premise that the federal constitutional law of excessive fines "has nothing to do with coercive, civil fines imposed for contempt of court." Pet. App. 18a.

This Court has not yet articulated the governing factors in analyzing whether a particular fine is excessive. Instead, the Court announced a preference for a process of litigating elucidation in the lower courts as a prelude to elaborating the content of the Excessive Fines Clause. See *Austin*, 61 L.W. at 4816 ("[p]rudence dictates that

we allow the lower courts to consider that question in the first instance"); *Alexander*, 61 L.W. at 4800 ("[w]e think it preferable that this question [whether the fine was excessive] be addressed by the [lower court] in the first instance").

Against this background, the fines here must be vacated and remanded so that the Virginia court—having been made aware of the applicability of federal constitutional limitations—can address this question in the first instance.

2. Much of what we have said with regard to the Excessive Fines Clause has equal force with respect to the Due Process Clause. That clause of the Fourteenth Amendment "imposes [on the state] substantive limits 'beyond which penalties may not go.'" *TXO Production Corp. v. Alliance Resources Corp.* — U.S. —, 61 L.W. 4766, 4769 (1993) (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)). In judicial determinations of whether a particular penalty is so grossly excessive as to violate the Due Process Clause, a "general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." *Id.* at 4770 (quoting *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

As noted, the Virginia Supreme Court proceeded on the basis that this Court's precedents regarding the federal constitutional limits on excessive fines do not govern civil contempt fines. Pet. App. 18a. Accordingly the Virginia court's discussion of this issue does not admit of the possibility that, even where a wrong is proved, there are "substantive limits 'beyond which penalties may not go.'" *TXO Production*, 61 L.W. at 4769.

Thus, on this basis as well, this Court should vacate the fines at issue, and remand for proper consideration of the constitutional limits on contempt fines imposed by the Due Process Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Petitioners,

v.

JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

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QUESTIONS PRESENTED

- I. Whether contempt fines are civil where a court has assessed the fines in accordance with a prospective fine schedule designed to coerce a contumacious party's compliance with the affirmative and prohibitory terms of a court injunction, and where the recalcitrant party could have avoided the fines simply by future compliance with the court order.
- II. Whether state courts may determine as a matter of state law that settlement of litigation does not automatically moot previously entered coercive and conditional civil contempt fines, and, if so, whether such a determination renders the fines criminal in nature.
- III. Whether contempt fines assessed in accordance with a prospective fine schedule imposing a specific amount for each *future* violation of an injunction contravene the Due Process Clause of the Fourteenth Amendment, where the contemnor can avoid additional fines at any time merely by complying with the court's lawful injunction, and whether petitioners have waived an Eighth Amendment argument that the fines in this case were excessive.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1625

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
v. *Petitioners,*
JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

**On Writ of Certiorari to the
Supreme Court of Virginia**

BRIEF FOR RESPONDENT JOHN L. BAGWELL

STATEMENT OF THE CASE

The contempt sanctions at issue in this case arose out of the 1989 strike by the International Union, United Mine Workers of America, and the United Mine Workers of America, District 28 (collectively "UMW" or "the Union") against coal companies in southwestern Virginia. The courts below found that, in the course of that strike, the Union and its members engaged in violent illegal acts on a massive scale. The trial court entered an injunction in an effort to quell the violence, but the Union repeatedly disobeyed the court order. The trial court then announced a prospective schedule of civil contempt fines—conditional on noncompliance—to coerce the Union to comply with the injunction. The Union nonetheless en-

gaged in "repeated, massive, violent violations" of the court's orders. Pet. App. 47a. The question is whether the trial court properly exercised its civil contempt power when it enforced the previously announced sanctions.

On April 12, 1989, the coal companies filed a verified complaint seeking to enjoin the Union, its members, and sympathizers from engaging in specified unlawful activities. The trial court held an evidentiary hearing and found that the Union was engaging in violent, intimidating, and damaging acts. An injunction was issued mandating that the Union conduct its strike lawfully and directing the Union to take affirmative actions to accomplish that end. *Id.* at 118a-121a. On April 29, 1989, the trial court amended and strengthened its injunction, finding that, notwithstanding the initial injunction, "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction have continued * * *." *Id.* at 113a.

The Union did not comply with the court's order, and its wholesale violation of the injunction continued. The trial court therefore ordered the Union to show cause why it should not be held in contempt. After the first contempt hearing, the trial court found 72 separate violations of its injunction. *Id.* at 109a. The court imposed \$642,000 in fines, \$424,000 of which were suspended. *Id.* at 4a n.2, 109a-111a. The court later vacated all of these initial fines on the ground that they were punitive and hence "criminal in nature," because the Union was not given the opportunity to avoid them once they were specified. *Id.* at 4a n.2.

The trial court then established a prospective fine schedule designed to coerce the Union to conduct its strike lawfully in compliance with the court's order. *Id.* at 111a. When it established the prospective fine schedule, the trial court made clear that it was attempting to coerce the Union into future compliance with its orders, and that the Union could avoid paying any fines merely by complying with the court's injunction:

[T]he union and its members are responsible for how much money * * * is going to be paid, not this Court, not the company, not anyone else. If you go out and violate the law, you are taking that action of your own free will and * * * you will pay the consequences, because it is your act. [*Id.* at 13a-14a (quoting trial court).]

Notwithstanding the prospective fine schedule, the Union continued to violate the injunction. Petitioners' statement of the case, Pet. Br. 2-7, does not remotely convey the extent or seriousness of the violence that gripped Russell and Dickenson Counties as a result of the Union's activities, or the challenge that the orchestrated violence presented to the ability of the circuit court to maintain the rule of law.

The record demonstrates that the Union engaged in mass picketing and blocking of ingress to and egress from coal company facilities, in violation of the court's injunction. *See, e.g.*, J.A. 65-66, 70-71, 125. The Union also coordinated creeping convoys hundreds of cars long to delay coal traffic on highways. *See, e.g.*, J.A. 100, 123-124, 129-132. Union members intimidated workers through threats of violence, engaged in countless acts of rock throwing, and threw and placed "jackrocks,"¹ creating what the State Police described as a "constant hazard" on public roads. J.A. 74; *see, e.g., id.* at 79-80, 85-87, 127, 136-140, 149, 181-184.

As the Virginia Supreme Court noted, the Union's violation of the trial court's orders "increased in frequency and became more violent" as the strike progressed, Pet. App. 14a, to the point that the trial court described the strike as "characterized by violence and terrorism" on

¹ "Jackrocks" are two nails welded together in the shape of a "v", so that a sharp point is always aimed upward, and are used as a tire puncturing device. Pet. App. 5a. The Union's use of jackrocks was so extensive that the police measured the amount recovered daily in pounds, not numbers. J.A. 128.

the part of Union members. *Id.* (quoting trial court). Hundreds of attacks on vehicles and their passengers are chronicled in the record, ranging from reports of smashed windshields and flattened tires, *see, e.g.*, J.A. 111-114, to instances of cars being run off the road, *id.* at 110-111, shot through, *see, e.g., id.* at 184-185, 193-194, and smashed by strikers, *see, e.g., id.* at 97, 184. Coal truck drivers, company personnel, and their families were subjected to attack. Individuals were threatened and attacked by strikers because their spouses were coal company employees. *See, e.g., id.* at 110-111, 134-135. Workers were pulled off the road, threatened, and assaulted by strikers. *See, e.g., id.* at 174-177, 190, 198-204. Strikers doused the face of a company guard with acid while hurling racial invectives at him. *Id.* at 191-192.

Union leaders coordinated strike activities, *see, e.g., id.* at 65-67, participated in illegal acts in violation of the court's orders, *see, e.g., id.* at 65-67, 71, 124, 141, 156, 194-196, and publicly announced their disdain for the court's orders. *See, e.g., id.* at 152, 172.

Petitioners suggest that the Union should not have been held responsible for the repeated violations of the injunction, *see* Pet. Br. 4 & n.1, but that issue is not before this Court. As the Virginia Supreme Court noted: "Signifi-

² To cite just one example, the acts of Union leaders in storming a coal processing plant for a three-day occupation, J.A. 167-173, rebuffing police requests to leave, *id.* at 168, and congratulating the strikers on their effective performance in the plant seizure, *id.*, provided clear evidence to the trial court that high-ranking union officials were the driving force behind the wave of lawlessness. At one point during the take-over, UMW Vice President Roberts told the strikers that their conduct "only constitute[d] a misdemeanor," *id.* at 170, and boasted that the trial judge would not put Roberts in jail for his actions because the judge did not have "guts enough." *Id.* at 173.

cantly, the Union has not challenged the sufficiency of th[e] evidence in these appeals." Pet. App. 4a. The reason petitioners raised no such challenge is clear. As the trial court concluded, the evidence "proves without question that the International United Mine Workers of America was the author of these actions." *Id.* at 40a, J.A. 29. The court concluded:

There has been an organized, coordinated effort by the UMW International and District 28 to put into effect mass violations of law and acts of violence. Not only by individual members, but there has been proof positive beyond a shadow of a doubt that the International leaders have been personally involved with these acts of violence. [*Id.* at 57.]

The federal district court dealing with the same strike at issue here reached the same conclusion. *Clark v. International Union, UMW*, 752 F. Supp. 1291, 1297 (W.D. Va. 1990).

In trying to stop the Union's lawlessness, the trial court was forced to issue no fewer than eight separate contempt orders against the Union. Prior to the entry of each contempt order, the Union was served with a show cause order outlining specifically the alleged contumacious conduct. *See, e.g.*, J.A. 157-163. Discovery was permitted and utilized. The Union was represented by counsel, and lengthy hearings were held with respect to each contempt order. The Union presented evidence and cross-examined opposing witnesses. The court heard myriad witnesses, reviewed hundreds of exhibits, and considered oral argument. The record of the proceedings is literally thousands of pages long. "[O]ut of an abundance of caution and trying to be fair to the defendants," the court required the allegations of particular contemptuous acts to be proved beyond a reasonable doubt. Pet. App. 93a. *See id.* at 55a, 61a, 64a, 71a, 77a, 83a, 85a, 86a, 97a, 102a. Significantly, the trial court rejected hundreds of allegations of contempt of its orders, carefully reviewing the

evidence under the heightened standard of proof before finding petitioners in contempt. *See, e.g., id.* at 67a.

The court imposed two types of fines. Civil compensatory fines were assessed, payable to the plaintiffs, based on the harm caused to the coal companies. Those fines were vacated and are not at issue here. The court also assessed civil coercive fines, in accordance with its prospective fine schedule, payable to the Commonwealth of Virginia and two affected counties. The trial judge repeatedly made clear that the purpose of these fines was to compel compliance, and that the Union could avoid the prospective fines by complying with the injunction:

The Court is convinced, as [it has] stated numerous times, that this is a civil contempt proceeding. The only way that any fines or any penalties can be assessed is for the defendants to fail to comply with the Court's injunctive orders and the laws of the Commonwealth of Virginia as [they] are stated or * * * outlined in the order. This is not punitive. It is compulsory. It is designed to compel compliance and therefore it is not criminal in nature but civil. [J.A. 166.]

In determining the level of fines needed to coerce compliance with its orders, the court had before it evidence that the UMW had net assets of \$170 million, including a strike fund containing some \$100 million. Va. S. Ct. No. 91-0634 J.A. at 565-566, 625. As the Union refused to comply with court orders, the fines accumulated under the prospective fine schedule. Over the course of seven additional contempt hearings following the establishment of the fine schedule, the trial court found over 400 violations of its injunction, most of them violent. In total, the Union chose to accumulate over \$64 million in fines.

After months of violence, the Union and the coal companies settled their labor dispute, and the strike ended. The Union, in the meantime, had not paid any of the fines. J.A. 59. As part of the settlement, the parties moved the trial court to vacate all the fines. The trial

court, after consideration, agreed to vacate the approximately \$12 million in compensatory civil fines that were payable to the companies for damage and harm caused to them by violations of the injunction. Pet. App. 48a.

The trial court refused, however, to vacate the remaining \$52 million in coercive civil fines that had been assessed in accordance with the prospective fine schedule. In refusing to vacate these fines, the trial judge emphasized yet again that the purpose of these prospective fines had been to try to compel compliance with the court's orders:

The Court early on announced its purpose in imposing prospective civil fines * * *. That purpose was to compel compliance with the Court's orders which were entered to protect the rights of the plaintiffs and the public. The fines were conditional and it was within the defendants' sole power to avoid payment of the fines. [*Id.* at 40a-41a.]

The court concluded that its orders "are not bargaining chips" that the parties may negotiate away. J.A. 60.

After the trial court appointed Special Commissioner John L. Bagwell to collect the outstanding fines, Pet. App. 51a-52a, the Union appealed the contempt orders and fines to the Virginia Court of Appeals. The UMW argued that the remaining fines were criminal, not civil, and were impermissibly imposed without all of the constitutional protections attending criminal proceedings. The Union also argued that the settlement rendered the fines moot.

The Court of Appeals "assume[d], without deciding," that the fines were civil, imposed by the trial court "to coerce compliance with its orders," and concluded that in light of the "magnitude of the violations * * * fines of considerable magnitude were reasonably required to coerce compliance from the Union." *Id.* at 30a-32a. The court ruled, however, that the settlement rendered the fines moot. It found the decision in *Clark v. Interna-*

tional Union, UMW A, supra, to be “eloquent” in explaining why settlement does *not* necessarily moot civil contempt fines, but the Virginia Court of Appeals concluded that the question was a matter of state law, and that binding state precedent required it to hold to the contrary. *Id.* at 34a-37a.

Before the Virginia Supreme Court, the Union contended that three questions were presented: (1) whether the settlement rendered the contempt fines moot, (2) whether the contempt fines were in fact criminal and accordingly rendered in violation of constitutional protections applicable in criminal contempt proceedings, and (3) whether the fines were so large as to violate due process and federal labor policy. The Union did not mention the Eighth Amendment in its Questions Presented. *See J.A.* 205-206.

The Virginia Supreme Court reversed, concluding that the fines imposed in accordance with the prospective fine schedule were civil, not criminal. The court found that the trial court established the fine schedule and imposed the fines to “coerce the Union into compliance with the court’s injunction.” *Pet. App.* 13a. The court also found that the Union “controlled its own fate,” and under the fine schedule had the power to avoid any of the specified fines merely by complying with the trial court’s injunction. *Id.* at 14a-15a.

The Virginia Supreme Court rejected the Union’s argument that the fines were criminal merely because they were imposed for violation of an injunction that prohibited the doing of an act, rather than for violation of an injunction that affirmatively required the performance of an act. In rejecting this argument, the court found that the coercive nature of the fines, as well as the Union’s ability to avoid them, did not in any way depend on the prohibitory or mandatory nature of the underlying injunction.

The Virginia Supreme Court also rejected the Union’s argument that the settlement required the trial court to

vacate all of the civil fines. The Virginia Supreme Court “agree[d] with the Court of Appeals that ‘whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law,’” and held as a matter of state law that the fines in question were not moot. *Id.* at 16a.

The court also found, in light of the financial strength of the UMW, the gravity of the harm caused by the UMW’s wrongdoing, and the UMW’s “utter defiance of the rule of law,” that the civil coercive fines were not excessive and did not constitute an abuse of discretion. *Id.* at 18a-19a.

SUMMARY OF ARGUMENT

I. The distinction between civil and criminal contempt turns on whether the sanction is coercive and conditional or punitive and determinate. In this case the trial court, confronted with repeated violations of its lawful injunction, announced a schedule of prospective fines—conditional on further violations by the Union—to coerce the Union to comply with the injunction. When the Union nonetheless persisted in violating the court’s orders, the court imposed the forewarned sanctions. That imposition—necessary to give effect to the court’s effort to compel compliance—did not transform the coercive, conditional fines into criminal contempt.

Contrary to the Union’s contention, the proper characterization of a contempt sanction turns on the substance of the proceeding and the character of the *sanction*—not on the phrasing of the underlying *injunction*. Whether the underlying injunction is labeled “mandatory” or “prohibitory” is not determinative; this Court, state courts, and the lower federal courts regularly uphold civil contempt sanctions for violations of prohibitory orders. There are many areas in which this Court distinguishes between remedial, civil sanctions and punitive, criminal ones, but in none of those areas does the Court look to whether the provision violated is mandatory or prohibi-

tory. One reason that petitioners' test has not been accepted as determinative is that it cannot be meaningfully applied: any mandatory order can be rephrased as a prohibitory one, and vice versa; injunctions (like this one) often contain both prohibitory and mandatory terms; and a prohibition in the context of an ongoing dispute of the sort at issue here necessarily requires affirmative steps by the party bound by the injunction to alter the offending conduct.

II. The settlement of the strike and litigation by the Union and the coal companies did not require the Virginia courts to vacate the coercive fines previously entered. Whether a settlement moots the fines is a question of state law, and the Virginia Supreme Court has provided the definitive answer to that question. Nor does the conclusion that the fines are not mooted somehow transform them from civil to criminal contempt. A ruling that the need to maintain judicial authority and respect for the law counsels in favor of enforcing coercive, conditional civil fines after settlement does not mean that the fines were not coercive and conditional in the first place.

Acceptance of the UMW's mootness argument would severely undermine the authority of courts to issue prospective, coercive civil fines to enforce compliance with lawful orders. If the Court agrees with the Union that a contumacious party has the power through settlement to strip the court of its discretion to vacate or enforce the fines, parties in future disputes will be able to disregard the authority of the court with impunity, knowing that any coercive fines assessed can be safely ignored. Such a precedent would eviscerate the very purpose of civil contempt proceedings, leave the court powerless to restrain impending lawlessness, and hold the court hostage to the negotiations of the parties.

III. The fines imposed in this case fully comported with constitutional safeguards. First, the Union has waived its Eighth Amendment argument. The Virginia

Supreme Court did not rule on any Eighth Amendment argument for the simple reason that petitioners failed properly to present one. The argument is therefore not properly before this Court. 28 U.S.C. § 1257.

The fines do not violate substantive due process. The final amount is large only because the Union—conspicuously forewarned—nonetheless chose to commit hundreds and hundreds of acts of contempt. As the trial court noted when it first announced the prospective fine schedule, the Union—not the court—was responsible for the amount of fines ultimately assessed. Given the magnitude and seriousness of the Union's contumacious conduct, the resources available to the Union, and the limited options available to the court to secure compliance with its lawful injunction, the schedule of coercive conditional fines satisfied this Court's standards. Nor can the Union object to the procedures employed in assessing the fines. The Union received detailed notice of the alleged violations prior to each contempt hearing, was represented by counsel, utilized discovery, presented evidence, examined and cross-examined witnesses, and was only found in contempt when the allegations were proved beyond a reasonable doubt.

ARGUMENT

I. THE CHARACTERIZATION OF A CONTEMPT FINE AS CIVIL OR CRIMINAL DOES NOT TURN UPON WHETHER THE COURT ORDER SOUGHT TO BE ENFORCED IS MANDATORY OR PROHIBITORY BUT UPON THE CHARACTER OF THE SANCTION.

The proper classification of the contempt sanctions in this case as civil or criminal is a question of federal law. As this Court has pointed out, however,

[w]hen a State's proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority "in a nonpunitive, noncriminal manner," and one who challenges the State's classification of the relief imposed as "civil" or "criminal" may be required to show "the clearest proof" that it is not correct as a matter of federal law. [*Hicks v. Feiock*, 485 U.S. 624, 631 (1988) (quoting *Allen v. Illinois*, 478 U.S. 364, 368-369 (1986)).³]

This case involves proceedings in Virginia courts under Virginia law, and the Virginia Supreme Court unanimously determined that the fines at issue here were imposed in a nonpunitive, noncriminal manner for civil contempt. Pet. App. 14a. Petitioners fail to establish by "the clearest proof" that this classification is incorrect as a matter of federal law. On the contrary, it is clear that the classification by the Virginia courts of the relief they provided was correct.

³ This presumption parallels the presumption in favor of Congress' classification of a statute as civil or criminal. See *United States v. Ward*, 448 U.S. 242, 248-249 (1980) ("[w]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground'") (citation omitted).

A. The Fines Were For Civil Contempt Because They Were Coercive And Conditional.

In determining whether contempt is civil or criminal, "the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks*, 485 U.S. at 631. When a court seeks to impose a determinate and unconditional penalty upon a contumacious party, the proceeding and any resulting fine are criminal. When the court establishes a prospective, conditional fine schedule to compel compliance and gives the party the opportunity to avoid any fines simply by future compliance with the court's order, the proceedings and any subsequent fines are civil. In the former situation, the court "is punishing yesterday's contemptuous conduct"; in the latter situation, "it is announcing the consequences of tomorrow's contumacious conduct." *Penfield Co. v. SEC*, 330 U.S. 585, 594 (1947). In the former case, the punishment is announced after the contempt and looks solely to the past. In the latter, the sanction is announced prior to the contempt and looks to the future, becoming effective only when the condition of noncompliance is met.

This Court's cases confirm the centrality of this distinction. In *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911), the Court explained that the difference between civil and criminal contempt lies "not [in] the fact of punishment, but rather [in the] character and purpose" of the contempt sanction. The Court noted that a contempt sanction is generally considered civil when designed either to remedy harm caused to the other party by the contempt, or to coerce the recalcitrant party into future compliance with court orders. By contrast, criminal contempt is more exclusively "punitive," and operates "not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." *Id.* at 441-443. The Court reiterated this key distinction in *United States v. United Mine Workers*, 330 U.S. 258,

303-304 (1947), characterizing criminal contempt as "employed * * * to coerce the defendant into compliance with the court's order, * * * to make the defendant comply."

More recently, in *Hicks*, this Court explained that where the contempt penalty imposed is "determinate and unconditional," it is "solely and exclusively punitive," and hence generally criminal in nature. 485 U.S. at 632-633. On the other hand, where the contempt penalty is "conditional," in the sense that the contemnor "has it in his power to avoid any penalty," the character of the contempt is coercive, and hence civil in nature. *Id.* at 633 (citations omitted).

The Virginia Supreme Court faithfully applied the teachings of this Court in analyzing the fines. It ruled that fines imposed by the trial court after the first contempt hearing were properly vacated because, under the principles set forth above, they were criminal in nature. These fines were "determinate and unconditional," based on the Union's numerous injunction violations *before* the trial court set a prospective schedule of fines for future violations. Pet. App. 13a. Because the fines were not conditional and the Union had no opportunity to avoid them *once* they were announced, the Virginia Supreme Court correctly concluded that they were criminal.

The remainder of the fines at issue here were of an entirely different sort, assessed for violation of the prospective fine schedule established by the trial court after the first contempt hearing. As the Virginia Supreme Court noted, it was "abundantly clear from the record" that the schedule was established "in an effort to coerce the Union into complying with the court's injunction." *Id.* at 14a. The court also noted that these coercive fines were entirely conditional, because the prospective fine schedule gave the Union "the power to avoid imposition of [the] fines" merely by complying with the court's outstanding orders. *Id.* Petitioners at all times had the "keys of

their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. at 590. Indeed, as Justice O'Connor has put it, they "carrie[d] something even better," because they could avoid sanctions altogether by complying with the order and not triggering the condition on the conditional fines. *Hicks*, 485 U.S. at 650 (O'Connor, J., dissenting).

Petitioners err in viewing the proceedings as of the time the party bound by the order has violated it and had sanctions imposed on him. As petitioners see it, at that point the contemnor is being punished for past conduct and can do nothing to avoid the punishment, so the contempt is criminal. The proper perspective, however, looks to the time the order is entered. At that point the party has the choice of complying with the order or violating it, and is faced with the announced, conditional sanctions intended to compel him to obey the court order. He can avoid the contempt sanctions completely by compliance. The proceedings are therefore civil, and they are not retroactively transformed into criminal proceedings if the party chooses not to comply with the order but instead to violate it, and accordingly incurs the forewarned sanctions.

An order that specifies that a party will be fined \$500 a day for every day child support goes unpaid looks to the future, and is intended to secure compliance. If after five days the child support is not paid and the court assesses a \$2,500 fine, that fine is not criminal punishment for past behavior but simply liquidation of the court's announced sanctions to compel future behavior. It is of course true that, on day five, the party can no longer avoid the \$2,500 fine, just as here the petitioners could not avoid the conditional contempt fines once the condition was satisfied and the fines were assessed against them for failure to comply with the circuit court order. But that does not transform the civil contempt into criminal contempt, or retroactively change the character of the relief from coercive to punitive.

The point is made clear by considering a classic case of coercive civil contempt: jailing a witness until he produces subpoenaed documents. See *Penfield Co. v. SEC*, 330 U.S. 585 (1947). If the witness refuses to comply for three days, he will be jailed for three days, not as punishment for his violation of the order, but to give effect to the conditional sanction announced by the court to coerce compliance. The fact that the three days have been served and can no longer be avoided does not render the sentence any less conditional and coercive. So too here when the Union elected to violate the court order in the face of the previously announced sanctions, it triggered the conditional fines. Just like the three days served by the witness, those fines do not lose their character as conditional and coercive after they have been incurred.

Numerous courts have reached the same conclusion:

[I]nvariably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. * * * The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge. [*Hoffman v. Beer Drivers & Salesmen's Union Local 888*, 536 F.2d 1268, 1273 (9th Cir. 1976).]

See also *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1185 (D.C. Cir. 1981) (to hold that imposition of previously announced fines for violation of court order is criminal contempt "would be to hold that a court may never bring about compliance with its orders by imposing prospective penalties in civil proceedings"); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 578-579 (D.C. Cir.), cert. denied, 389 U.S. 327 (1967).

The Second Circuit made the same point in *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). The court explained there that conditional coercive sanctions did not lose their civil character when the defendants chose noncompliance, simply because "[t]he factual determination of noncompliance—the assessment of whether the standards showing contempt were satisfied—and the resulting imposition of fines necessarily occurred after defendants' ample opportunity to comply had come and gone." The Ninth Circuit agreed in *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 533 (9th Cir. 1991), concluding that "[t]he fact that a hearing was held subsequent to the violation does not turn an otherwise civil contempt citation into a criminal one."

Petitioners are quite wrong to contend that the situation of a party bound by an injunction and facing coercive, conditional fines is indistinguishable from that of any member of the general public who must comply with the criminal law. See Pet. Br. 24. The party bound by an injunction has, through its prior conduct, demonstrated that the entry of injunctive relief against it is justified in the first place. For example, when it entered the amended injunction in this case, the circuit court found that "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction" were taking place as a result of the strike; that these illegal acts "are being committed by members of the International and District 28 and the locals in question, or those acting for them;" and that "[t]he acts described will continue if not enjoined." Pet. App. 113a-114a. Prior to announcement of the fine schedule at issue in this case, the circuit found—after a hearing—"72 separate violations of the injunction * * * attributable to said defendants * * *." *Id.* at 109a. The Union was plainly not in the situation of "any member of the general public," Pet. Br. 24, when the prospective fine schedule was announced.

It is in any event difficult to discern the point of this argument. Congress can, of course, provide criminal and civil penalties for the same conduct. The civil penalties are not invalid as criminal punishment simply because the same conduct may be prosecuted criminally. See *United States v. Ward*, 448 U.S. at 250. So too here the fact that conduct that violates a court order and thereby triggers civil conditional fines designed to coerce compliance with the order may also violate the criminal law does not render the coercive civil fines criminal.

B. The Fact That The Underlying Injunction Was Phrased In Part In Prohibitory Terms Does Not Render The Coercive Conditional Fines Criminal Contempt.

Contrary to the foregoing analysis, petitioners discern in this Court's precedents a mechanical rule that fines imposed for violation of a prohibitory order are necessarily criminal, while those imposed for violation of a mandatory order are civil. Petitioners look not to "an examination of the character of the relief itself," *Hicks*, 485 U.S. at 636, but rather to the phrasing of the underlying injunction.

The Union relies primarily on language from this Court's decision in *Gompers*, but the contention that *Gompers* established a talismanic mandatory/prohibitory test finds no support in *Gompers* itself. The Court in *Gompers* was more constrained, noting only that the distinction "generally" affords "a test" for determining the character of the punishment. 221 U.S. at 443 (emphasis added). This Court was plainly not establishing a mechanical formula that overrode the basic distinction between punishment for past acts and conditional sanctions designed to coerce a party's future conduct. *Gompers* involved simple violation of an injunction; the punishment imposed was not a previously announced sanction designed to secure compliance, which the defendant could avoid completely by compliance. See *id.* at

420-422 n.1. The probative value of the distinction drawn in *Gompers* evaporates if the sanction was announced as a *conditional* matter *prior* to the violation to compel compliance. That situation was not considered in *Gompers*.

Petitioners also rely heavily on this Court's statement in *Hicks* that "a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order." 485 U.S. at 632. We agree. But nothing in *Hicks* suggests that performance of an *affirmative* act was a limitation on those situations in which fines payable to the court are civil because they can be avoided by the party subject to the order. *Hicks* happened to involve an order phrased in terms requiring an affirmative act (though it just as easily could have been phrased in terms prohibiting conduct), so it was natural for the Court to refer to such a means of compliance in making the point that the key feature distinguishing civil from criminal contempt is the ability to avoid the fine by compliance with the order.

This Court's decision in *United Mine Workers* confirms that the affirmative or prohibitory label is not determinative in classifying contempt as civil or criminal. The order at issue in that case was plainly phrased in prohibitory terms: the defendants were "restrained * * * from permitting to continue in effect" a notice calling a strike, "from issuing or otherwise giving publicity to" any such notice, "from breaching any of their obligations" under an agreement, "from coercing, instigating, inducing, or encouraging the mine workers [to strike]," and so on. 330 U.S. at 266 n.12. Yet the Court recognized that this prohibitory order could support civil contempt fines. See *id.* at 303 ("The trial court also properly found the defendants guilty of civil contempt"). Of the \$3.5 million in fines assessed by the district court, this Court upheld \$700,000 as punishment for criminal contempt, and then announced that it would impose the

other \$2.8 million unless the union, within five days, complied with the temporary restraining order. *Id.* at 305. This Court did not regard the prohibitory nature of the order as somehow restricting its power to announce a coercive civil sanction that would be imposed for violation of the order.⁴

Judge Learned Hand read *United Mine Workers* as imposing prospective civil coercive fines for violation of a prohibitory order. In *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467 (2d Cir. 1958), the Second Circuit considered a district court order entered after violation of a consent decree prohibiting Golden Rule from selling Sunbeam products below list price. Among other things, the order specified that Golden Rule must pay a fine of \$2,500 for every future violation. Speaking through Judge Hand, the court upheld this provision, "rely[ing] upon" this Court's opinion in *United Mine Workers*. 252 F.2d at 472. The injunction at issue in *Sunbeam* was prohibitory—it "forbade Golden Rule from advertising or selling any price-fixed Sunbeam product below list price." *Id.* at 468. That is also how Judge Hand construed the injunction in *United Mine Workers*, as one in which "future conduct [was] forbidden," and he saw "no relevant difference between ceasing to strike * * * and ceasing to sell goods * * *." *Id.* at 472 (emphasis added).

⁴ The Union contends that the defendants in *United Mine Workers* "were not subject to a broad prohibitory order." Pet. Br. 19-20 n.7 (emphasis in original). A simple reading of the district court order, set forth in this Court's opinion, confirms beyond doubt that it is prohibitory. See 330 U.S. at 266 n.12. After specifying that the union must "comply with the temporary restraining order," this Court did go on to explain what was required to constitute full compliance with the prohibitory order: withdrawing the notice terminating the agreement and notifying union members of the withdrawal. *Id.* at 305. The fact that such a plainly prohibitory order can be rephrased to impose mandatory obligations simply demonstrates the manipulability of the mandatory/prohibitory distinction, discussed more fully below. See *infra* at 25-28.

Since *United Mine Workers*, this Court has upheld sanctions imposed for violation of a prohibitory order as valid exercises of the coercive civil contempt power. In *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), for example, the district court had entered a prohibitory injunction "enjoining petitioners from discriminating against nonwhites, and enjoining the specific practices the court had found to be discriminatory." *Id.* at 431. When this order was violated, the district court imposed fines on the contemnors, which this Court found "were clearly designed to coerce compliance with the court's orders, rather than to punish petitioners for their contemptuous conduct." *Id.* at 444. Nowhere did this Court adopt petitioners' view that sanctions imposed for violation of a prohibitory order must be characterized as criminal contempt.

In *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court upheld civil remedies imposed on a company under an injunction prohibiting it from continuing to violate the wage and hour laws. When the company failed to comply with the prohibitory injunction, the Wage and Hour Administrator brought a civil contempt action, and the trial court imposed financial sanctions payable to affected, non-party employees. This Court approved the sanctions as civil relief:

We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. [*Id.* at 193.]

In short, there is no merit to the Union's contention that this Court's precedents forbid the use of civil fines to coerce a party to stop violating prohibitory injunctions.

Nor is the Union correct to suggest that the Virginia Supreme Court has radically departed from the mainstream of American jurisprudence in its analysis of the Union's contempt. No "new test" or "alternate approach"

(Pet. Br. 9, 21) was devised by the court. Indeed, in their petition for a writ of certiorari, petitioners effectively conceded that the Virginia Supreme Court's holding is in accord with the view of the overwhelming majority of courts that have considered whether coercive fines imposed under a prospective fine schedule are civil under the reasoning of *Gompers* and *Hicks*. See Pet. for Cert. 7.

For example, in a line of cases involving the efforts of "Operation Rescue" to block access to abortion clinics, three United States Courts of Appeals have recently held that fines assessed according to a prospective schedule intended to coerce a party from continuing to take action prohibited by an injunction are civil within the meaning of *Gompers* and *Hicks*. Thus, in reviewing the contempt award for each subsequent daily violation of the trial court's prohibitory injunction, the Second Circuit held in *New York State National Organization for Women v. Terry*:

[T]here is no doubt that the sanctions were entirely conditional and coercive. * * * The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights. * * * Faced * * * with a choice between compliance or noncompliance with the district court's order, defendants chose the latter course.

* * * Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature. [886 F.2d at 1351 (emphasis added).]

Both the Third and the Ninth Circuits have reached the same conclusion. *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991); see also *NOW v. Operation Rescue*, 816 F. Supp. 729 (D.D.C. 1993).

Similarly, in upholding fines imposed under a prospective schedule against the former air traffic controllers'

union for its violation of an injunction against continuing a strike, the United States District Court for the District of Columbia concluded that the argument that such fines were "punitive, rather than coercive, [is] meritless." *United States v. PATCO*, 110 LRRM 2858, 2864 (D.D.C. 1982).

Finally, in a case involving the very same UMW strike at issue here, the United States District Court for the Western District of Virginia opined that "fines assessed under a prospective fine schedule issued in an effort to halt prohibited conduct certainly appear to fall within the Supreme Court's definition of civil contempt fines." *Clark v. International Union, UMWA*, 752 F. Supp. at 1297 n.7.

Indeed, one of the more common and frequently repeated statements of the civil contempt power expressly encompasses violations of both mandatory and prohibitory injunctions. As the court noted in *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987) (emphasis added), *cert. denied*, 487 U.S. 1205 (1988):

A party may be held in contempt if he violates a definite and specific court order requiring him to perform *or refrain from performing* a particular act or acts with knowledge of that order. The civil contempt sanction is coercive rather than punitive and is intended to force a recalcitrant party to comply with a command of the court.

See also, e.g., *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983) ("A court has power to adjudge in civil contempt any person who willfully disobeys a specific and definite order requiring him to do *or to refrain from doing* an act") (emphasis added); *Lichenstein v. Lichenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970) ("Civil contempt * * * is committed when a person violates an order of court which requires that person in specific and definite language to do *or refrain from doing* an act or series of acts") (emphasis added).

In fact, the courts of appeals have routinely upheld findings of civil contempt resulting from violations of injunctions or other court orders prohibiting specified conduct.⁵ In addition, in numerous cases involving the National Labor Relations Board, courts of appeals have found parties in civil contempt for violating prohibitive injunctions and court orders.⁶

⁵ See, e.g., *Hartman v. Lyng*, 884 F.2d 1103, 1105-06 & n.2 (8th Cir. 1989) (injunction prohibiting Farmers Home Administration employees from demanding the voluntary conveyance of farm property); *FSLIC v. Blain*, 808 F.2d 395, 398-399 (5th Cir. 1987) (injunction prohibiting transfer of property without prior written approval of FSLIC); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1022-23 (9th Cir. 1985) (injunction prohibiting use of terms likely to cause confusion with plaintiff's trademark), *cert. denied*, 474 U.S. 1059 (1986); *Perry v. O'Donnell*, 759 F.2d 702, 703-704 (9th Cir. 1985) (order prohibiting transfer of proceeds of a divorce settlement); *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 781, 784-785 (7th Cir. 1981) (consent decree and injunction prohibiting acts of fraud or misrepresentation); *Shakman v. Democratic Organization of Cook County*, 533 F.2d 344, 346 & nn.2-3, 348-350 (7th Cir.) (injunction prohibiting political organizations and governmental units from coercing government employees to take part in political activity), *cert. denied*, 429 U.S. 858 (1976).

⁶ See, e.g., *NLRB v. Trailways, Inc.*, 729 F.2d 1013, 1016-17 (5th Cir. 1984) (order prohibiting company from discharging or discriminating against employees based on union activity); *NLRB v. Southwire Co.*, 429 F.2d 1050, 1052-53 (5th Cir. 1970) (order prohibiting unlawful discharge of or discrimination against employees), *cert. denied*, 401 U.S. 939 (1971); *NLRB v. United Mine Workers of America*, 393 F.2d 265, 266-267 (6th Cir.) (order prohibiting UMW from restraining or coercing employees in the exercise of their rights under the NLRA), *cert. denied*, 393 U.S. 841 (1968); *NLRB v. Local 254, Building Service Employees International Union, AFL-CIO*, 376 F.2d 131, 133-134 (1st Cir.) (order prohibiting union from threatening, coercing, or restraining persons engaged in commerce), *cert. denied*, 389 U.S. 856 (1967). See also *NLRB v. United Mine Workers of America*, Nos. 80-1680, 82-1998, 84-2307, & 85-1003 (4th Cir. Apr. 24, 1987) (court of appeals finds union in contempt and enters prospective fine schedule on petition

The area of contempt is of course not the only area in which this Court is called upon to distinguish between remedial and punitive sanctions. The Court draws the same distinction when, for example, classifying statutes as civil or criminal, see *United States v. Ward*, 448 U.S. 242 (1980), determining the applicability of the Double Jeopardy Clause to a particular sanction, see *United States v. Halper*, 490 U.S. 435 (1989), and considering whether a statute is a bill of attainder, see *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), or an ex post facto law, see *Johannessen v. United States*, 225 U.S. 227 (1912). In answering those and similar questions, the Court looks to considerations such as the classification intended by the legislature, see *Ward*, 448 U.S. at 248-249; *Selective Service System*, 468 U.S. at 854-856, and whether the sanctions serve nonpunitive goals. See *id.*; *Halper*, 490 U.S. at 448. In none of these areas in which the Court must decide whether a sanction is remedial or punitive—the same question at issue here—does the Court ask whether the underlying provision that was violated is mandatory or prohibitory. Petitioners offer no explanation for why this factor should be *determinative* in the contempt context, when it serves *no* role at all when the Court looks at the same issue in other contexts.

C. The Mandatory/Prohibitory Test Cannot Be Meaningfully Applied.

As the Virginia Supreme Court recognized, petitioners' affirmative/prohibitory test "presents a distinction without a difference." Pet. App. 15a. As a matter of logic, any mandate can be phrased as a prohibition, and vice versa. A prohibition on illegal strike activities is a requirement to comply with the laws and orders making the activities illegal. An order directed against protesters blocking access to a clinic can be styled in mandatory

of NLRB); *id.* (Apr. 23, 1990) (same; consent contempt adjudication requiring payment from union to NLRB).

terms—comply with trespass laws—or prohibitory terms—do not trespass. An order concerning prison population can be phrased affirmatively—lower the population to 400 inmates—or in prohibitory terms—house no more than 400 inmates in the institution.⁷

The complete manipulability of the test proposed by petitioners flies in the face of this Court's admonition that States must be given "intelligible guidance" about how their contempt proceedings will be classified as a matter of federal law. *Hicks*, 485 U.S. at 636. If, as under petitioners' approach, the proper classification of a proceeding turns on, for example, whether it is viewed as mandating steps to stop an illegal strike or prohibiting steps in furtherance of an illegal strike, the States are given no practical guidance whatever. The approach of the Virginia Supreme Court, in contrast—and the approach of every federal court of appeals to have considered the question—affords clear guidance based on whether the order is designed to coerce compliance by specifying sanctions the party bound by the order can avoid by compliance.

The mandatory/prohibitory distinction cannot be determinative because injunction orders often contain both obligations phrased in affirmative terms and obligations phrased in prohibitory terms. See, e.g., *NLRB v. Blevins Popcorn Co.*, 659 F.2d at 1175; *Labor Relations Comm'n v. Fall River Educators' Ass'n*, 382 Mass. 465, 416 N.E.2d 1340, 1342 n.2 (1981). That is true of the orders at issue in this case. The trial court orders sought

⁷ Professor Dobbs has termed the affirmative/prohibitory distinction relied upon by the Union a "deviant" test for determining whether contempt fines are civil or criminal. Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 239-240 (1971). As he notes, "[i]n many situations the two kinds of injunctions are different in form, but not in purpose or effect." Dobbs, *Law of Remedies* 224-225 (1993). See Note, *Civil and Criminal Contempt of Court*, 46 Yale L.J. 326, 328 (1936) (affirmative-prohibitory test "seems fatally superficial in that it enables the judge to phrase the order either negatively or positively").

not only to force the Union to obey the law, but also directed that the Union leadership take affirmative steps to inform members and sympathizers to do likewise. The injunctive orders affirmatively called upon the UMW to:

- Use all lawful means reasonably available to it to insure compliance with the injunction. That was not done.
- Place a designated supervisor or captain at each picket site to enforce the injunction. That was not done.
- Make available the names of strike supervisors to law enforcement authorities. That was not done.
- Report to the court in writing all violations of the injunction. That was not done. [See Pet. App. 115a-116a, 120a.⁸]

Quite apart from these express affirmative directives in the injunction, it is important to recognize that injunctions of the sort at issue here are entered in the course of ongoing lawlessness. It did not occur to the trial court out of the blue to prohibit the Union from placing members at the specifically identified mine entrances "in such a manner as to obstruct the vision of operators of vehicles, entering or exiting, of the roadway for oncoming traffic," or from placing more than ten persons as pickets at identified spots. The court prohibited such acts because the Union was doing just that in the course of the strike. The prohibitions therefore required affirmative acts by the Union to change the course of its conduct. Labeling such an order as prohibitory or affirmative is an exercise with no relation to what this Court has said is "critical" in classifying contempts—an examination of "the substance of the proceeding and the character of

⁸ The UMW steadfastly refused to comply with its affirmative obligations. Instead, Union officials openly defied the court's orders, and participated in violations of the injunction. See *supra* at 4-5 & n.2.

the relief that the proceeding will afford." *Hicks*, 485 U.S. at 631.

* * * * *

In sum, the Union's exclusive reliance on the affirmative/prohibitory distinction obfuscates the true question: whether the fines were simply after the fact punishment for *past* injunction violations and hence criminal in nature, or conditional efforts to achieve *future* compliance with court orders. The Virginia Supreme Court correctly found the latter to be the case:

When a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control of his destiny. The same is true with respect to the court's orders in the present case. A prospective fine schedule was established solely for the purpose of coercing the Union to refrain from engaging in certain conduct. Consequently, the Union controlled its own fate. [Pet. App. 15a.]

The Union has not carried its burden of showing by "the clearest proof" that the State's classification of these sanctions as civil rather than criminal was incorrect. *Hicks*, 485 U.S. at 631. That classification accordingly should be respected.

II. THE SETTLEMENT OF THE LABOR DISPUTE DID NOT MOOT THE CIVIL COERCIVE CONTEMPT FINES.

A. The Effect Of A Private Settlement On The Collection Of Unpaid Contempt Sanctions Is A Question Of State Law That Has Been Resolved By The Highest Court Of Virginia.

The Virginia Supreme Court plainly grounded its decision on mootness in state law. Pet. App. 16a ("We agree with the Court of Appeals that 'whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law'").

Under state law, it held that "the fines in question are not moot." *Id.* at 17a. It reasoned:

Courts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained. If we were to adopt the Union's mootness contention, any organization which faced coercive, contempt fines would know that, in order to completely avoid payment of the fines, it only had to postpone actual collection of the fines until the settlement of the underlying litigation. [*Id.*⁹]

Petitioners' extended attack, Pet. Br. 25-37, on the Virginia Supreme Court's holding that settlement of the case did not moot the contempt sanctions rests on an unstated assumption that the mootness question in the state proceeding is necessarily governed by federal law. Petitioners make no effort to ground this assumption in either a federal statute purporting to preempt state court contempt procedures or provisions of the Federal Constitution allegedly mandating this result. Rather, petitioners' entire argument rests on the surprising assertion that the state courts are bound by this Court's announcement of a federal rule of decision in *Gompers*. *Id.* at 25 ("*Gompers* * * * is the governing precedent. * * * *Gompers* requires reversal of the decision below"). There is, however, no basis in federal statutory or constitutional law to require the Virginia Supreme Court to dismiss coercive civil con-

⁹ The Court also noted its view that "our resolution of the issue is consistent with federal decisions." Pet. App. 17a (citing *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), cert. denied, 449 U.S. 1113 (1981) and *United States v. Work Wear Corp.*, 602 F.2d 110 (6th Cir. 1979)). These cases are discussed *infra* at 37-38 & n.13. This observation, of course, does not indicate that the court rested its decision on federal law; it used the federal cases "only for the purposes of guidance" and plainly did not believe that the cases "themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

tempt sanctions whenever the underlying private dispute is settled.

Contrary to the mode of analysis reflected in petitioners' brief, the application of federal rules in state proceedings—like the exercise of federal power generally—is not a default option that governs unless it can be demonstrated otherwise. Rather, this Court has observed on numerous occasions that, even in suits within the jurisdiction of the federal courts, state law governs unless a federal statute or the Constitution mandates a contrary rule, or unless—in rare cases—federal interests require application of federal common law.

The Court's seminal decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), "reflects the principle that federal courts should apply state law to legal issues, unless there is some federal interest sufficient to justify the application of independent federal standards." 19 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4515 at 275. Ordinarily, the federal interest sufficient to justify the application of federal law is articulated in the Constitution or federal statutes enacted pursuant to constitutional authority. *Hanna v. Plumer*, 380 U.S. 460, 471-472 (1965). Although federal courts may fashion federal common law in certain circumstances where the rights and duties of the United States are at issue, "where 'litigation is purely between private parties and does not touch on the rights and duties of the United States,' federal law does not govern." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988) (quoting *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956)). See also 28 U.S.C. § 1652.

In a related vein, this Court has repeatedly confirmed the independent role of state courts in our federal system. The Court has recognized, for example, that "the allocation of authority in the federal system" empowers state courts to adopt rules at odds with those that would be applied in the federal courts. *ASARCO, Inc. v. Kadish*,

490 U.S. 605, 617 (1989). "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law * * *." *Id.*¹⁰ See also *Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983).

The Court has specifically addressed the primacy of state law and state courts in the matter at issue in this case: the contempt power. "That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." *Michaelson v. United States*, 266 U.S. 42, 65 (1924). See also *Young v. Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 & n.7 (1987). Unless state law mandates otherwise, the state courts, no less than federal courts, retain the power to sanction contempt as a core function of judicial authority. In *Juidice v. Vail*, 430 U.S. 327 (1977), this Court observed that

The contempt power lies at the core of the administration of a State's judicial system * * *. Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal, we think the salient fact is that federal-court interference with the State's contempt process is "an offense to the State's interest * * *." [*Id.* at 335-336 & n.12 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).]

These principles compel the conclusion that the Virginia Supreme Court committed no error when it determined that vested civil contempt fines survive settlement by the parties. There is no basis in the Constitution or laws of the United States to require application of a

¹⁰ Among those limitations, of course, is the mootness limitation at issue in this case.

federal rule to resolve that question. A state court's resolution of the issue is squarely within the core power of the state courts to determine the legal boundaries of contempt proceedings within their jurisdiction.

For this reason, all of the cases cited by petitioners in support of their view that the coercive fines are moot are irrelevant. *E.g.*, Pet. Br. 29 n.13. None involves the controlling law of Virginia.

B. Permitting Collection Of Coercive Civil Contempt Fines After Settlement Of The Private Dispute Out Of Which The Fines Arose Does Not Transform Those Fines Into Criminal Contempt Penalties.

Petitioners also make the alternative argument that the state court's failure to hold the fines moot transformed the civil coercive penalties into criminal sanctions. *See, e.g.*, Pet. Br. 28. We have already demonstrated that the coercive fines at issue here were plainly civil because they were imposed pursuant to a conditional and prospective fine schedule. Nothing in the Virginia Supreme Court's decision to permit collection of those fines after settlement of the underlying suit changed the essential character of the civil fines.

The decision of the Virginia Supreme Court was grounded in its understanding that civil contempt orders are not all of the same character. It has long been recognized that "[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers*, 330 U.S. at 303-304. *See also McComb v. Jacksonville Paper Co.*, 336 U.S. at 191 ("Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance") (emphasis added).

In examining the mootness question below, the Virginia Supreme Court suggested that the effect of settlement on the continuing vitality of contempt sanctions turns on which type of civil contempt sanction is at issue in any particular case. Thus, the court observed that this Court's federal decision in *Gompers*—although not binding here—was not inconsistent with the rule it announced: "In *Gompers*, unlike in the present case, the only relief sought was compensatory relief to be paid to the complainant company, which had settled its case. *Gompers* did not involve coercive, civil contempt sanctions." Pet. App. 18a.

Although petitioners have repeatedly derided the Virginia Supreme Court's understanding of *Gompers*, *e.g.*, Pet. Br. 33, it is faithful to the facts of the case. As the *Gompers* Court itself explained, "this was a proceeding in equity for civil contempt where *the only remedial relief possible was a fine payable to the complainant.*" 221 U.S. at 451 (emphasis added). The mootness rule applied in *Gompers* was directly related to the inability of the complainant to secure the relief sought as a result of the settlement: "[W]hen the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character." *Id.* at 451-452. The Virginia Supreme Court's understanding of *Gompers*, moreover, is echoed in this Court's decision in *United Mine Workers*, where the Court observed that "[w]here compensation is intended," the complainant's "right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy." 330 U.S. at 304 (emphasis added).

There is, of course, nothing surprising in the rule that a private settlement between the parties in the underlying dispute would moot *compensatory* contempt sanctions; settlements ordinarily constitute a resolution of all disputes between civil litigants. The trial court in this action

observed this rule, agreeing to vacate the \$12 million in compensatory civil fines payable to the companies for damages incurred as a result of petitioners' violations of the injunction. *See supra* at 2, 7.

Conversely, there is nothing illegitimate about a rule permitting *coercive* civil contempt sanctions of the type at issue here to survive the settlement of the underlying suit; there is certainly nothing about a state's adoption of such a rule that compels the conclusion that those otherwise civil fines are transmogrified into criminal sanctions. As we have already explained, that basic distinction is determined by reference to the character of the contempt sanction. The determination, moreover, is properly made at the time the prospective sanction is announced; later occurring events over which the court has no control (such as the contemnor's violation or settlement) should not be the basis for finding that the court's announcement of the sanctions, legitimate when made, could not later be enforced.

Apart from their incorrect intimations that the federal rule they describe governs directly, petitioners make very little effort to explain why the Virginia Supreme Court's decision must, as a constitutional matter, transform these coercive civil fines into criminal sanctions. Their primary argument appears to be that the courts below, announcing their decisions to require the collection of liquidated fines, considered the judicial and public interests that would be served by collection. *E.g.*, Pet. Br. 26 & n.12.¹¹ But vindication of these interests *after* the announcement of valid prospective coercive civil con-

¹¹ Petitioners also suggest that the trial court's appointment of a special commissioner to pursue collection of the contempt sanctions converted the proceeding into criminal contempt litigation. Pet. Br. 26, 32. But a state court's decision to permit pursuit of the action by a special commissioner as an officer of the court no more makes this a criminal action than pursuit of civil penalties by government officials renders those actions criminal in nature. *See United States v. Ward*, 448 U.S. 242 (1980).

tempt sanctions and numerous violations of the underlying order is plainly lawful.

This Court has repeatedly recognized that contempt sanctions—whether civil or criminal—may legitimately serve mixed purposes, and inevitably do. In *Gompers*, the Court observed that “if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.” 221 U.S. at 443.¹² In determining the civil or criminal nature of the sanctions, however, the Court has looked to the character of those sanctions rather than their indirect effect: “[S]uch indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.” 221 U.S. at 443.

We have demonstrated that the sanctions at issue here were conditional and coercive *civil* sanctions announced by the court to secure compliance with its injunction. The court's later decision to vindicate its authority and the public interest by enforcing its lawful orders was nothing more than an indirect effect of the Union's law-

¹² Considering the contempt at issue in *Juidice*, the Court observed that although it “serves * * * to vindicate and preserve the private interests of competing litigants, * * * its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory.” 430 U.S. at 336 n.12. Most recently, the Court observed in *Hicks v. Feiock*, 485 U.S. at 635, that “[i]n contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.” *See also Hutto v. Finney*, 437 U.S. 678, 690-691 (1978).

lessness. The record in this case plainly establishes that the fine schedule was not announced as a means of vindicating the authority of the court. Rather, it was announced to secure compliance with its order. Pet. App. 14a. Petitioners now ask this Court to hold that a consequence of their resistance to these sanctions is that their obligation to pay dissipates upon settlement of the underlying dispute. That rule should be rejected.

To remove from a state court the power to collect coercive civil sanctions after settlement of the underlying dispute, as petitioners urge, would utterly eviscerate the efficacy of civil contempt sanctions. If petitioners' argument governed, any individual or organization facing coercive civil contempt fines would know that it had only to postpone actual collection of the fines until the settlement of the underlying dispute to avoid payment of the fines altogether. As the *Clark* court noted:

If this court's inherent power of coercion to enforce its orders by civil contempt is inhibited as the Union seeks under the facts of this case, and if the Union can by simple averment that the strike is over avoid the consequences of its disobedience as is sought here, then the Union's tour de force will be complete: it will be above the law in Southwest Virginia. [752 F. Supp. at 1302.]

Indeed, the UMW, having refused to pay its fines when they were first incurred, seeks now to be rewarded for its total disregard of court orders. If the UMW had paid its civil contempt sanctions (instead of, as it did, ignoring them), it could hardly argue that its settlement of the underlying strike would somehow transform those paid-up sanctions into illegitimate criminal penalties and thereby automatically entitle it to reimbursement for its payments.

In the particular context of this case, moreover, adoption of the rule petitioners urge would eliminate the historic power of state courts to enter coercive civil contempt fines. Although frequently acrimonious and extended, labor disputes almost always result in settlement. A union

—or an employer—found in civil contempt of court during the pendency of a strike, and threatened with coercive fines to secure compliance with a court's order, would, under petitioners' rule, be under no coercion whatsoever as a result of the fines. Rather, the contemnor would have every incentive to flout the court's orders, and its fines, confident that the matter will eventually be settled and the fines rendered moot by the settlement.

Even in the lower federal courts, which are of course bound by any rule announced in *Gompers* and this Court's cases, it is understood that coercive civil fines do not necessarily evaporate upon the settlement of the underlying proceedings.

In *United States v. Work Wear Corp.*, 602 F.2d 110 (6th Cir. 1979), a coercive civil contempt fine had been imposed on an antitrust defendant for failure to divest itself of certain businesses pursuant to a consent decree. The Sixth Circuit affirmed the district court's refusal to grant a joint request to vacate the fine after the divestiture had been completed. The Sixth Circuit rejected the argument that the district court's decision demonstrated the criminal nature of the contempt sanction. Citing the Second Circuit's earlier observation in *United States v. Wendy*, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978), that "[t]he civil nature of the contempt is not turned criminal by the court's efforts at vindicating its authority," the court observed that "[t]his is particularly true here, where the contempt sanction imposed was a coercive daily fine, designed to secure compliance with and respect for the court's order." *Work Wear*, 602 F.2d at 115.

Similarly, in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570 (D.C. Cir.), cert. denied, 389 U.S. 327 (1967), the court refused to vacate a coercive civil contempt fine imposed for violation of an anti-strike injunction on the ground that the contempt was mooted by the return of the unions to work. The union argued, as petitioners do here, that the imposition of the earlier-

prescribed conditional and coercive fines after its return to work made the fines punitive and the action criminal in nature. *Id.* at 578. "We cannot agree," the court wrote, "that these proceedings evolved, at any stage, into a criminal contempt action." *Id.* In its decision arising from the same strike that led to this lawsuit, the District Court for the Western District of Virginia relied on these authorities to hold that the fines at issue there were not moot as a result of the settlement of the strike. *Clark, supra*.¹³

Ultimately, however, we of course do not suggest that these federal court decisions bound or permitted the Virginia Supreme Court to adopt the rule it announced below. Rather, its historic power of equity, and its status as an independent and coordinate state court, permitted the Virginia court to determine as a matter of state law that settlement of the underlying labor strike should not result ineluctably in dissipation of liquidated fines for the Union's contempt. That decision did not transform the sanctions into impermissible criminal contempt penalties. It merely enforced the earlier-announced consequence of petitioners' conscious decision to defy the circuit court's efforts to maintain public safety and security in the region.

III. THE CIVIL FINES IMPOSED IN RESPONSE TO THE UMW'S REPEATED ACTS OF CONTEMPT COMPORT WITH THE CONSTITUTION.

A. The UMW Has Waived Its Eighth Amendment Claim By Failing Properly To Present The Issue To The Court Below.

Although the UMW now maintains that the civil contempt fines assessed against it violate the Excessive Fines Clause of the Eighth Amendment, it made no Eighth

¹³ See also *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980) (even where record in underlying proceeding is closed, question regarding coercive contempt not moot: "We do not perceive the role of the district court in this important case as a hired umpire dragged in from the street to preside over a dispute between private litigants"), *cert. denied*, 449 U.S. 1113 (1981).

Amendment argument before the Virginia Supreme Court. The Union therefore has waived its right to have this Court consider that issue. See 28 U.S.C. § 1257.

This Court has long made clear that, when reviewing the judgment of a state's highest court, it will not consider an issue that was not raised or decided below. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 218-219 (1983) (summarizing cases); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 398 (1836). Moreover, the issue must be presented to the state court "in such manner as to bring it to the attention of that court." *Green Bay & Miss. Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 68 (1898). Where state procedural rules require that the issue be raised in a particular manner or at a particular time, failure to follow such rules will prevent review of the issue by this Court. See *Webb v. Webb*, 451 U.S. 493, 501 (1981); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962). Finally, this Court has made clear that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). See *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974).

Because the opinion of the Virginia Supreme Court is devoid of any reference to the Excessive Fines Clause or the Eighth Amendment,¹⁴ the UMW must establish that the issue nevertheless was properly presented to that court

¹⁴ Any suggestion by the UMW that the Virginia Supreme Court addressed an Eighth Amendment claim is simply wrong. Cf. Pet. Br. 38. The UMW suggests that the state court was discussing this Court's recent Eighth Amendment jurisprudence, when in fact the Virginia court was analyzing the Union's due process claim and the cases relied upon by the UMW in support of its due process argument: *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), and *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). Pet. App. 18a.

in order to seek review here. The Union cannot satisfy this burden.

The "Questions Presented" by the UMW to the Virginia Supreme Court made no mention of the Eighth Amendment or its Excessive Fines Clause. J.A. 205; Br. for Appellant, at 5 (Va. S. Ct. No. 92-0299); Br. for Appellees, at 7 (Va. S. Ct. No. 91-0634).¹⁵ Indeed, in one brief, the sole reference to the issue was a lone sentence appearing as a footnote within the discussion of the due process issue, where the UMW suggested that "[b]y parity of reasoning, the fines imposed are so unreasonably large as to violate the excessive fines clause of the Eighth Amendment."¹⁶ Br. for Appellant, at 23 n.16 (Va. S. Ct. No. 92-0299). In the Union's other brief, the only references were the same sentence, this time in the text of the due process discussion, and a reference in an argument heading and a conclusory paragraph. Br. for Appellees, at 4, 44-45 (Va. S. Ct. No. 91-0634). The UMW clearly failed to satisfy the requirements of the Virginia Supreme Court regarding the manner in which issues must be presented, for that court has emphasized that it will not wade through lengthy briefs or the record hunting for critical issues. See, e.g., Va. S. Ct. Rule 5:27; *Spencer v. Commonwealth*, 240 Va. 78, 99, 393 S.E.2d 609, 622, cert. denied, 498 U.S. 908 (1990); *Nicholas v. Harnsberger*,

¹⁵ The Union filed two sets of briefs because the Virginia Supreme Court had before it two appeals. In one, the Virginia Court of Appeals had ruled on the validity of the first five contempt orders. Va. S. Ct. No. 91-0634. In the other, the appeal pending before the Court of Appeals regarding the remaining three contempt orders was certified to the Virginia Supreme Court. Va. S. Ct. No. 92-0299. See Va. Code Ann. § 17-116.06. In the former case the Union was appellee; in the latter it was appellant.

¹⁶ Even if this Court were to find that this sentence was sufficient to preserve the Eighth Amendment issue for review here, the UMW should not be permitted to expand its argument beyond the point suggested by this sentence, which is that the protection afforded by the Eighth Amendment extends no further than the safeguard of due process.

180 Va. 203, 22 S.E.2d 23, 25 (1942). Thus, the reason the Virginia Supreme Court did not mention any Eighth Amendment argument in its decision is the obvious one: no such argument was properly presented to it. Because it failed properly to raise the Eighth Amendment issue before the Virginia Supreme Court, the UMW cannot seek review of that issue here.

Nor is there anything about the UMW's asserted Eighth Amendment claim that warrants relaxation of this Court's strict rule against reaching an issue that was not properly presented to the state court. Indeed, this Court has found a waiver of analogous issues where a litigant has failed to preserve the claim for review. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988).

B. The Accumulated Civil Contempt Fines Imposed On The Recalcitrant Union, Which Cover Hundreds Of Violations Occurring Over Many Months, Do Not Violate The Constitution.

The Union maintains that its due process rights were violated because the amount of the fines was not calibrated to the harm caused or the severity of the acts, and because the levies were "grossly excessive." See Pet. Br. 37-38, 40. Neither argument withstands scrutiny.

As an initial matter, the UMW's reliance on this Court's recent decisions in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), is misplaced. As the Virginia Supreme Court recognized, "[t]hese cases * * * deal with the issue of punitive damages and have nothing to do with coercive, civil fines imposed for contempt of court." Pet. App. 18a.¹⁷ The distinction is crucial, for while punitive damages are designed to punish a wrongdoer for past conduct, civil contempt

¹⁷ The Virginia Supreme Court was specifically referring to *Browning-Ferris* and *Haslip*, the cases upon which the UMW relied before that court. This Court's decision in *TXO* had not yet been announced.

fines primarily serve the remedial function of seeking to secure compliance with the court's order.

The criteria to be employed in assessing the propriety of a civil contempt fine were established not in *Haslip* or *TXO*, but long ago in *United States v. United Mine Workers*, 330 U.S. 258 (1947). There the Court upheld both criminal and civil contempt fines against the UMW, as well as criminal fines against its president. The Court explained the different factors to be taken into account in each situation. In the case of criminal contempt, the focus is properly on the past conduct which led to the fine:

In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge. [*Id.* at 303.]

As discussed below, these factors are strikingly similar to those suggested by this Court in *Haslip* and *TXO* as appropriate for evaluating punitive damage awards. Such a resemblance is not surprising, given that both criminal contempt sanctions and punitive damage awards are designed to punish past conduct.

The analysis is very different, however, in the case of civil contempt. Because the aim is "to coerce the defendant into compliance with the court's order," *id.*, the court must "consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Id.* at 304. In addition, fines for civil and criminal contempt should both take into account "the amount of defendant's financial resources and the conse-

quent seriousness of the burden to that particular defendant." *Id.* Applying these criteria, this Court in *United Mine Workers* assessed a prospective \$2.8 million fine against the UMW, a fine that would be imposed if the UMW failed to comply with the order at issue in that case within five days after issuance of the mandate. *Id.* at 305. *See supra*, at 19-20.

The very same principles that led to the assessment of a multi-million dollar civil contempt sanction against the UMW nearly five decades ago require that the sanctions imposed by the trial court in this case be upheld. The trial court's day-to-day familiarity with the Union's activities made it aware of the violent character of the Union's conduct and the magnitude of the threat that conduct presented not only to the coal companies and their employees but to the general public as well. *See, e.g.*, Pet. App. 44a. Given that it was dealing with a "financial giant," the court recognized that significant fines were required to attempt to compel the Union to comply with the lawful injunction. J.A. 188. As the Virginia Court of Appeals put it, "[a] review of the facts in the record which reflect the magnitude of the violations involved and the resulting impact on the operations of the Companies, as well as the communities at large persuade us * * * that fines of considerable magnitude were reasonably required to coerce compliance from the Union." Pet. App. 31a-32a.

In rejecting the UMW's attack on the fines, the Virginia Supreme Court was likewise faithful to this Court's holding in *United Mine Workers*. The Virginia court examined each of the factors announced by this Court as relevant to an evaluation of a civil contempt fine. Thus, the court specifically considered "the Union's vast financial resources and the magnitude of the injunction violations," *id.* at 18a, as well as the fact that "the imposition of fines was the only device available to the trial court to coerce the Union into compliance with the court's injunction." *Id.* at 19a. Because the Virginia

Supreme Court properly applied this Court's precedent in upholding the civil contempt fines at issue, there is no basis for overturning those fines now.

The amount of the civil contempt fines imposed in this case represents a proper and lawful exercise of the trial court's discretion. As this Court has emphasized, the very nature of the factors to be analyzed in assessing a fine mandates that "great reliance must be placed upon the discretion of the trial judge." *United Mine Workers*, 330 U.S. at 303. See *In re Grand Jury Subpoena Duces Tecum*, 91-02922, 955 F.2d 670, 673 (11th Cir. 1992). The trial court's decision should not be disturbed absent a showing that this discretion has been abused. Given the UMW's flagrant and repeated violations of the trial court's injunction, the schedule of prospective fines thereafter established by the court certainly was neither unreasonable nor arbitrary. The sanctions imposed by the trial court therefore should remain undisturbed.

Moreover, even if this Court's recent decisions in *Haslip* and *TXO* were found to apply in the context of a civil contempt fine, the analysis mandated by those cases establishes that the fines at issue here comport with due process. In *Haslip*, this Court upheld a large jury award of punitive damages, despite the defendant's assertion that the verdict was "the product of unbridled jury discretion." *Haslip*, 111 S. Ct. at 1037. While the Court recognized that "general concerns of reasonableness and adequate guidance * * * enter into the constitutional calculus," *id.* at 1043, the Court found these concerns satisfied where the jury had been properly instructed and its verdict had been fully reviewed through the appellate process. *Id.* at 1046.

Likewise, in *TXO*, the Court upheld a punitive damages award of \$10 million that accompanied a compensatory damages award of only \$19,000. 113 S. Ct. at 2717. The Court acknowledged that the Due Process Clause places limits on the amount of punitive damages that can be assessed, and determined that in reviewing such

damage awards, it was appropriate to consider the potential harm caused by the improper conduct, the need to deter similar behavior in the future, general concepts of reasonableness, and the deliberateness of the wrongful conduct. *Id.* at 2721-22.

By the time the trial court in this case first issued its schedule of prospective fines, there had already been more than 70 violations of the court's injunctions issued barely a month before. Pet. App. at 109a. The trial court's subsequent contempt orders imposing fines reflect a cogent understanding of the actual and potential harm presented by the UMW's continued unbridled lawlessness, the deliberateness of the Union's actions, and the need to deter future violations. See, e.g., *id.* at 77a-79a, 92a-94a, 102a-104a. Consequently, to the extent that *TXO* and *Haslip* apply to this case, their requirements were satisfied.¹⁸

The UMW's suggestion that it was deprived of due process because of the manner in which the fines were assessed is directly refuted by the facts. The Union received show cause orders prior to each hearing which set forth each incident of assertedly contumacious conduct. In addition, the UMW was represented by counsel throughout the hearing process; it was permitted to and did conduct discovery prior to each hearing; and it was able to present evidence and examine witnesses at each hearing. More significantly, the UMW at all times had notice of the specific monetary sanctions it would face

¹⁸ Indeed, that the UMW was not deprived of due process is even more apparent when the circumstances of this case are contrasted with those in *Haslip* and *TXO*. In each of those cases, the defendants were faced with unexpectedly high punitive damages as a result of their past conduct. Unlike the UMW, those defendants had no opportunity to decide in advance whether to incur specific monetary liabilities by engaging in conduct that was known to carry such financial consequences. Nevertheless, in both *Haslip* and *TXO* this Court found that the punitive damage awards comported with due process. No different result is warranted here.

for each future violation of the trial court's lawful injunction. Indeed, after each contempt hearing, the Union was able to assess its financial liability based on its violations to date. Nevertheless, the UMW and its members chose to continue to display contempt for the trial court in the face of ever-mounting fines by committing additional violations and thereby incurring additional sanctions. It defies common sense to label the result of such a choice a deprivation of due process.

Nor does the aggregate amount of the civil contempt fines imposed against the UMW in the instant case warrant a finding that the fines exceed constitutional bounds. Although the UMW makes much of the fact that it could find no other case imposing fines of this magnitude, see Pet. Br. 37 n.20, the UMW fails to acknowledge that the assessments at issue represent the aggregate fines for over four hundred individual violations of the trial court's injunctions over an eight-month period. When each sanction is considered individually, the Union's argument collapses. The fact that the combined total of the sanctions climbed so high simply reflects the unprecedented level of scorn with which the strikers regarded the injunctions. The court in *Madden v. Grain Elevator, Flour & Feed Mill Wkrs.*, 334 F.2d 1014, 1022 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965), might well have been speaking of this case when it declared that the union there had "no right to complain of the results which followed its persistent violations, any more than an overweight individual has just cause for complaint against the scale upon which he stands which informs him of his overweight."

Moreover, the fines imposed against the UMW here are no less reasonable than those which this Court itself imposed against the UMW in 1947. In *United Mine Workers*, this Court determined that a fine of \$2.8 million was warranted if the UMW refused to comply with the Court's mandate within five days. 330 U.S. at 305. Trans-

lated to 1990 dollars, this fine for a single act of contempt would equal approximately \$16.8 million.¹⁹ In comparison, the accumulated fines imposed here for over four hundred acts of contempt can hardly be deemed unconstitutional.

Indeed, the UMW does not and cannot assert that the fines assessed against it were disproportionate to its repeated acts of contempt.²⁰ Nor can the Union disavow responsibility for the violence with which it conducted the strike of 1989. When the trial court was faced with a "financial giant," J.A. 188, which refused to comply with the rule of law and which used its contumacy for economic leverage, the court resorted to the only effective legal means it could muster to attempt to bring about compliance with its orders.

The findings of contempt and the assessment of the fines at issue comported with the requirements of the Constitution and this Court's precedents.²¹ After choos-

¹⁹ This calculation is based on a comparison between the Consumer Price Index for March 1947, when this Court rendered its decision in *United Mine Workers*, and that for August 1990, when the trial court refused to vacate the civil coercive fines in this case.

²⁰ Although the Union suggests that the analysis below was procedurally flawed because of the trial court's failure to calibrate the fines to the actual harm caused by the Union's tactics, Pet. Br. at 38, such an analysis is required neither by *United Mine Workers*, nor by *Haslip* and *TXO*. Moreover, the trial court properly observed that because the fines were not civil compensatory fines, there was no need to correlate the amount of the fines directly to the millions of dollars spent by the state in attempting to maintain order, the losses suffered by private citizens, or the millions in compensatory fines made payable to the coal companies. See J.A. 188.

²¹ Even if this Court were to find that the UMW did not waive its claim premised on the Excessive Fines Clause, and assuming that the Clause would apply to the civil contempt fines at issue, there would be no basis for finding that these fines violate the Eighth Amendment. In holding that the fines comported with due process and the dictates of *United Mine Workers*, the Virginia Supreme Court considered the harm threatened by continued con-

ing to treat the court's authority as an object of derision, and the violation of court orders as a badge of honor, the UMW now seeks to escape the ineluctable consequences of its choice. The Virginia Supreme Court properly ruled that the UMW must accept financial responsibility for its actions. That decision is lawful, just, and essential to the ability of the judiciary to coerce compliance with lawful injunctions when the risk of mass disorder threatens the safety and security of the community.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be affirmed.

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tumacy (Pet. App. 18a), the deliberateness of the UMW's violations (*id.* at 19a), the fact that the imposition of fines was the only device available to coerce compliance (*id.*), the large number of violations (*id.*), the financial resources of the contemnor (*id.* at 18a), the coercive (rather than punitive) character of the fines (*id.* at 14a, 19a) and the general appropriateness of the fines under the circumstances of this case (*id.* at 18a-19a, *see also id.* at 31a-32a). The court plainly considered any factors that could be deemed relevant to an Eighth Amendment claim. Thus, even if the Court finds that the Eighth Amendment issue is properly before it and that such an analysis is applicable in this context, the judgment should be affirmed.

No. 92-1625

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
v. *Petitioners,*

JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

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<i>Bessette v. W. B. Conkey Co.</i> , 194 U.S. 324 (1904)	4
<i>Bloom v. Illinois</i> , 391 U.S. 194 (1968)	2, 11, 20
<i>Chambers v. NASCO</i> , 111 S. Ct. 2123 (1991)	18
<i>Gompers v. Bucks Stove & Range Co.</i> , 221 U.S. 418 (1911)	<i>passim</i>
<i>Green v. United States</i> , 356 U.S. 165 (1958)	2
<i>Hicks v. Feiock</i> , 485 U.S. 624 (1988)	<i>passim</i>
<i>Leman v. Krentler-Arnold Co.</i> , 284 U.S. 448 (1932)	4, 15
<i>McComb v. Jacksonville Paper Co.</i> , 336 U.S. 187 (1949)	4, 18
<i>McCrone v. United States</i> , 307 U.S. 61 (1939)	18
<i>NHL v. Metropolitan Hockey Club</i> , 427 U.S. 639 (1976)	18
<i>Penfield v. SEC</i> , 330 U.S. 585 (1947)	12, 16
<i>Selective Service System v. Minnesota Public In- terest Res. Group</i> , 468 U.S. 841 (1984)	9
<i>Sheet Metal Workers v. EEOC</i> , 478 U.S. 421 (1986)	4
<i>Shillitani v. United States</i> , 384 U.S. 368 (1966)	16, 17
<i>TXO Prod. Corp. v. Alliance Resources Corp.</i> , 113 S. Ct. 2711 (1993)	20
<i>United States v. Mine Workers</i> , 330 U.S. 258 (1947)	4, 5, 16, 18
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REPLY BRIEF FOR PETITIONERS

A. *The Mandatory/Prohibitory Dichotomy.* The starting point for analysis—and the one point of agreement between the parties—is that there is a class of contempt proceedings (“criminal contempt”) in which constitutional criminal due process requirements govern and there is a class of such proceedings (“civil contempt”) in which those requirements do not govern. See *Hicks v. Feiock*, 485 U.S. 624, 631-35 (1988) (citing cases).

In shorthand terms, it is our submission that the class of criminal contempt includes all contempt proceedings growing out of a private civil case in which a substantial, determinate, noncompensatory fine payable to the court (or the state) is assessed on the finding that the defendant has violated a *prohibition* in the underlying order. And, it is the submission on the other side that criminal contempt covers only those situations in which such a contempt fine is “unscheduled,” and that the inclusion in the underlying court order of a “prospective schedule of fines for future violations” places all ensuing contempt proceedings on the civil contempt side of the line. Resp. Br. 14-15.

The briefs on the other side charge us with proposing a “mechanical rule”—a “talismanic” test—that looks not to the “character of the relief itself but to the phrasing of the underlying injunction,” and treat our submission in this oversimplified fashion throughout. Resp. Br. 18. These epithets more properly describe their theory of the case. But response to this mischaracterization requires review of what we have previously shown regarding this Court’s contempt jurisprudence, the long lines of legal history, and the interests and values expressed by the Constitution’s criminal due process provisions. As we now show, all these factors have led this Court, in the particular context of contempt, to the mandatory/prohibitory dichotomy. None lead to the “scheduled” penalty/“unscheduled” penalty dichotomy.

1. a. The well-settled law is that the Constitution guarantees to a defendant, faced with the prospect of

criminal contempt sanctions for the violation of a court order, the procedural protections required generally in criminal proceedings. That law rests on two bases.

First, "the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates"; that being so "[c]riminal contempt is a crime in the ordinary sense" and "in every fundamental respect." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

Second, this Court has emphasized that the criminal contempt context presents an additional and "even more compelling argument . . . for providing" a defendant with constitutional criminal procedure protections. *Bloom*, 391 U.S. at 202. A charge of "[c]ontemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament." *Id.* In this highly charged context, the Constitution's criminal procedures are essential "protection[s] against the arbitrary exercise of . . . [a] summary power . . . which is liable to abuse." *Id.* (internal quotations omitted).¹

b. At the same time, traditional equity practice afforded a party injured by another party's disobedience to an equity order in the first party's favor redress through an ancillary equity proceeding carried on as part of the basic case. See Pet. Br. 16-17 n.5, 29 n.13. And, the contempt proceedings that follow the equity forms and that lead to the kinds of remedial orders in favor of the complainant that characterized equity have continuously been considered civil proceedings, and have never been equated with the criminal law or been deemed to be gov-

¹ See Pet. Br. 12-13. See generally *Green v. United States*, 356 U.S. 165, 198-99 (1958). (Black, J., dissenting from majority decision later overruled in *Bloom*) ("When the responsibilities of law-maker, prosecutor, judge, jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause").

erned by the constitutional criminal due process requirements.

c. Given the different levels of constitutional protections afforded to a defendant faced with these two forms of judicial authority, this Court has sought to mark a clear distinction between sanctions that *in substance* operate as civil contempt sanctions and those that *in substance* operate as criminal contempt sanctions.

The starting point has been recognition of the distinct natures and purposes of the two forms of sanction:

If [the proceeding] is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive to vindicate the authority of the court. [*Hicks*, 485 U.S. at 631 (*quoting Gompers v. Bucks Stove*, 221 U.S. 418, 441 (1911))].

But, as *Hicks* explained, this Court has also recognized that this conceptual dichotomy, by itself, is too abstract and too indeterminate to be a rule of decision:

In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order. [485 U.S. at 635.]

And, this Court has warned that:

Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided. In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both. [*Hicks*, 485 U.S. at 635].

For these reasons, this Court has formulated "a few straightforward rules," *Hicks*, 485 U.S. at 631—based on both the history and the logic of the situation—to determine whether a given sanction is properly classified as criminal or civil in its nature, and thereby to determine the procedural prerequisites to its imposition.

First, where the contempt sanction is unambiguously "to compensate the complainant for losses sustained" the sanction is unquestionably civil and remedial in nature. *United States v. Mine Workers*, 330 U.S. 258, 304 (1947).²

Second, where the contempt sanction is noncompensatory in nature and partakes of coercion to secure compliance with an order beneficial to a complainant as well as general deterrence and retribution to vindicate public authority, this Court has looked to the following test to determine whether the sanction should be classified as remedial (and thus civil) or punitive (and thus criminal) in its essential nature:

² The opposing briefs repeatedly mischaracterize our position as being "that sanctions imposed for violation of a prohibitory order must be characterized as criminal contempt." Resp. Br. at 21; U.S. Br. 13. This is not our position. A court is free to proceed in civil contempt for violation of any order—be it prohibitory or mandatory—when the sanction is *compensatory*. Consequently, the opposing briefs' citations of cases in which the Court has authorized civil contempt sanctions to enforce prohibitory orders are beside the point: *Leman v. Krentler-Arnold Co.*, 284 U.S. 448 (1932) (reviewing a *compensatory* civil contempt sanction for defendant's violation of a prohibitory order); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949) (same). Similarly, *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 329 (1904), suggests only that *compensatory* civil contempt sanctions would be available against a defendant who violates a court order "to abstain from some action." The contempt sanctions at issue in the final case upon which the opposing briefs rely provide a mixture of compensatory relief and coercive relief in support of a mandatory order. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (reviewing a civil contempt fine imposed to create a fund that provided direct benefits to the complainant class in order to ensure the defendant's compliance with a mandatory aspect of an order, but only until such compliance was achieved).

The distinction between [contempts for] refusing to do an act commanded, —remedied by imprisonment [or coercive fine] until the party performs the required act; and [contempts for] doing an act forbidden, —punished by imprisonment for a definite term [or coercive fine]; is sound in principle, and generally, if not universally, affords a test by which to determine the [civil or criminal] character of the punishment. [*Hicks*, 485 U.S. at 632-33 (quoting *Gompers*, 221 U.S. at 443)].³

d. This mandatory/prohibitory dichotomy serves to distinguish sanctions that are structured in the uniquely remedial terms of traditional equity orders and sanctions structured in terms of the kind of deterrence of harmful conduct provided by traditional criminal sanctions.⁴ By

³ The opposing briefs claim that we overread *Gompers* in light of its statement that its rule is "sound in principle" and "generally" affords the applicable test. But it was only prudent for the Court, in announcing a rule to govern future decisions, to frame that rule so that *principled* exceptions can be accommodated. (The most likely candidate for an exception to the general rule—that non-compensatory contempt sanctions supporting a prohibitory order are criminal—is the small subcategory of prohibitory orders whose violation can be "undo[ne]." *Hicks*, 485 U.S. at 633. For example, the violation of an order prohibiting defendant to build a house can be undone by an order requiring the defendants to tear the house down.) It is also very much to the point in this regard that neither respondent nor the government argues that the "scheduled" penalty/"unscheduled" penalty approach constitutes a principled exception to the *Gompers*' general rule. Nor could they, since their approach would abolish that rule.

The opposing briefs' restatement of their claim that *Mine Workers* rejected the *Gompers* approach is similarly unconvincing. We have already set out the pertinent part of the opinion in full at Pet. Br. 19-20, n.7 and explained why that passage is an illustration of the mandatory/prohibitory dichotomy, not a rejection of it. And, neither respondent nor the government do business with *Mine Workers*' text. See Resp. Br. 19-20, U.S. Br. 13-14.

⁴ As we detailed in our opening brief, the English and early American equity practice was to issue orders that coerced discrete affirmative acts for the direct benefit of a complaint and that spent their force when the acts were done. See Pet. Br. 16 n.5. Such

so doing, this approach both grants the trial judge the flexible authority in civil cases that characterized equity and safeguards the Constitution's criminal due process protections against dilution. And, by providing an objective basis for determining which sanctions may be imposed through civil proceedings and which only through criminal proceedings, the distinction provides meaningful guidance to trial judges and to reviewing judges, without requiring the latter to engage in an inquiry into the subjective motivations of the former.⁵

sanctions leave to the criminal law and to criminal contempt the deterrence of conduct harmful to the complainant and to the society.

And, as we also explained in our opening brief, the criminal law has historically been, and remains generally, a law of stated prohibitions against wrongful acts, enforced by the imposition of stated noncompensatory penalties (imprisonment, fine, or forfeiture). See Pet. Br. 22; see also W. LaFare, *Criminal Law* 183 (3d ed.); L. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 Wayne L. Rev. 367 (1965); G. Hughes, *Criminal Omissions*, 67 Yale L.J. 590 (1958).

⁵ Respondent asserts that the mandatory/prohibitory distinction "cannot be meaningfully applied" because of its "complete manipulability." Resp. Br. 26. But the distinction between acting and remaining passive is one of the basic distinctions we use to order our experience. The word "act" "[d]enotes external manifestation of [an] actor's will. . . . In its most general sense, this noun signifies something done voluntarily by a person." Black's Law Dictionary (5th ed. 1979). By the same token, the distinction between a command to act and a command to refrain from acting is generally accepted, and is one readily perceived in most situations. Indeed, the examples given by respondent to illustrate the "manipulability" of this distinction serve to rebut that characterization.

Respondent argues that a prohibition on illegal strike activities (e.g., do not picket) can also be put in a mandatory language (e.g., "comply with the laws and orders making the activities illegal"), and that "[a]n order directed against protestors blocking access to a clinic can be styled in mandatory terms—comply with trespass laws—or prohibitory terms—do not trespass." Resp. Br. 26. These manipulations are transparent: the essence of either direction to the defendant is clearly prohibitory. Finally, respondent argues that "an order concerning prison population can be phrased affirmatively—lower the population to 400 inmates—or in prohibitory terms—house no more than 400 inmates in the institu-

2. Respondent and the government ask this Court to renounce the *Gompers/Hicks* framework, and to establish in its place a scheduled penalty/unscheduled penalty dichotomy as the test for distinguishing "coercive" civil contempt from criminal contempt. Under *this* dichotomy a contempt proceeding is civil contempt whenever the underlying court order (no matter how prohibitory the order may be) sets out a stated penalty (whether a determinate noncompensatory fine or prison term) in the event of a violation. In contrast, if a court issues an order against engaging in certain conduct and does *not* state the penalty, any such fine or prison term imposed on a defendant who violates that prohibition will be in criminal contempt. See Resp. Br. 14-15; U.S. Br. 11. On any commonly accepted standard of evaluation, this dichotomy fails.

a. The opposing briefs fail to cite a single instance in this Court's contempt law precedents in which the Court has articulated a "scheduled" penalty/"unscheduled" penalty distinction. The reason is clear; there is none.⁶

The only aspects of this Court's contempt jurisprudence that the opposing briefs invoke are general statements of the proposition that "remedial" contempt sanctions and "conditional" contempt sanctions are civil. See e.g., Resp. Br. 13-18; U.S. Br. 9-11. The theory proposed is that a scheduled penalty is "remedial" because it is designed to "coerce" compliance with a court order, and is "conditional" because the defendant has "the power to avoid imposition of [the] fines' merely by complying with the court's outstanding orders." Resp. Br. 14 (quoting

tion." Resp. Br. 26. But, the substance of either order is clearly mandatory, assuming that the prison population is currently more than 400. And, regardless of which wording is chosen, the defendant's obligations are limited to the performance of a discrete affirmative act.

⁶ Nor do the opposing briefs make any showing that the dichotomy they offer was embodied in the contempt jurisprudence of the equity courts of England. Once again, this is because no such showing is possible. Compare Pet. Br. 16-17 n.5.

Pet. App. 14a). This approach robs the terms "remedial" and "conditional" of all intelligible meaning.

(i) At the outset, we note that the opposing briefs treat as "remedial" all "coercive" and "conditional" sanctions that tend to induce compliance with an order that benefits another. A sanction is considered "coercive" if violation of the order is understood to prompt the sanction. And, all legal orders are so understood in virtually all legal regimes. Moreover, a sanction is considered "conditional" if the defendant has "the power to avoid imposition of [the sanction] by complying with the outstanding order[]." Again, legal orders generally are within that formulation in virtually all legal regimes. To be terms of distinction, "remedial," "coercive" and "conditional" simply must have more content than this. Indeed, it is the fact that it is all but impossible to conceive of legal sanctions that are not "remedial", "coercive", and "conditional" in a surface sense that has prompted this Court to look deeper in order to formulate more precise rules to distinguish the contempt sanctions that are *qualitatively* different in these terms from the sanctions associated with the traditional criminal law. See pp. 3-4, *supra*.

(ii) Nor do respondent or the government provide any basis for concluding that their understanding of "remedial" contempt orders and of "conditional" contempt orders entails the conclusion that their "scheduled" penalties/"unscheduled" penalties dichotomy is sound. After all, judicial orders are not mere precatory expressions of judicial preference. Rather, with or without explicit schedules of penalties, such orders are complete "conditional" legal commands backed by the clear understanding that a penalty will follow their violation, but will not follow if there is no violation. And, the purpose served by these threatened penalties is that of "coercing" compliance with the underlying order.

Equally to the point, there is no reason to believe that the purpose to vindicate public authority, which stands behind criminal contempt, is any less effectively or directly

served by judicial imposition of a "scheduled" penalty than by imposition of an "unscheduled" penalty. Indeed, there are few ways in which a judge can make more clear that his authority will be vindicated at all costs, and that he will abide no trifling with his authority, than to make it unmistakably clear that any violations of his orders will be met with the most severe penalties. In whatever sense such scheduled penalties may be "remedial," it is not a sense that makes the penalties any less emphatically a means for vindicating the authority of the court.

(iii) What is clear is that, given the nature of our criminal law, the notion that "scheduled" penalties for the violation of a prohibition are uniquely "civil" turns matters upside down. The imposition of previously stated penalties for the violation of previously stated prohibitions is most certainly the historic province of the criminal law. Indeed, the law of crimes has been, and remains generally, a law of stated prohibitions against wrongful actions, coupled with stated noncompensatory penalties (imprisonment, fine, or forfeiture) for violations of these prohibitions. See pp. 5-6 n.4, *supra*; Pet. Br. 22. Against this background not even Alice In Wonderland can be called on to justify the opposing briefs' novel use of the English language.⁷

⁷ The government's effort to bolster its position through a survey of this Court's cases that consider the line between "regulation" and "punishment" in contexts far afield from contempt proceedings (U.S. Br. 15-16) falls short of its mark.

None of the cited cases mentions—much less endorses—the "scheduled" penalty/"nonscheduled" penalty distinction for which the government argues.

And, while the government claims that these cases have set forth a broad "basic rule" that "burdens on . . . citizens" are not to be considered "punitive" if they are "rationally related to [a] non-punitive objective," U.S. Br. 16, *Selective Service v. Minnesota Public Interest Res. Group*, 468 U.S. 841 (1984), suffices to show that the government's near limitless understanding of "nonpunitive objective" does not accord with the case law's more measured understanding of the term. See *id.*, at 851-52 ("[I]ntent to encourage compliance with the law does not establish that a [sanction] is

(iv) What is also clear is that the scheduled penalty/unscheduled penalty dichotomy offered by the opposing briefs leaves the constitutional interests that stand behind this Court's contempt jurisprudence at the trial judge's mercy. This dichotomy—as opposed to the mandatory/prohibitory dichotomy—truly turns on the form of words used in framing the order. And this is so, putting aside all questions of evasion and manipulation. The position offered in favor of the scheduled penalty approach is, in essence, that each judge is, and should be, free in each case to enter any prohibitory order and to impose any contempt fine or prison sentence for a violation, without regard to the constitutionally prescribed criminal procedures, so long as he appends to his order a schedule of maximum penalties.

merely the legitimate regulation of conduct. Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct.”). See also *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (“traditional aims of punishment [include] deterrence”).

More generally, a reading of the cited cases makes it plain that the issues being considered in each are conceptually distinct from the others, and from the issues presented by this case. As this Court has recognized, the imposition by a court of a noncompensatory fine for violating the court's order has, by its nature, both punitive and remedial elements. The question posed here is how to determine which element predominates. In cases such as *Bell v. Wolfish*, in contrast, it is perfectly possible to view the challenged government action—there “double bunking” of pretrial detainees rather than “single bunking”—as a practical response to a practical problem that is not motivated by any desire to harm those affected in retribution for any wrong they have committed or to deter such wrongful conduct in the future. Indeed, that is the way the *Bell v. Wolfish* Court did look at the government action there.

It is intuitively obvious that the differences between *Bell v. Wolfish* and this case outweigh the similarities and that the determination of whether a contempt order is punitive or remedial calls for a method of inquiry that takes those differences into account. It is undoubtedly for this reason that *Hicks*, which was decided after all the cases the government invokes, nevertheless treats the traditional law of contempt, previously elaborated by this Court—and not some more general law of punishments in the abstract—as the touchstone.

This Court has emphasized that the contempt power is a power that “is liable to abuse.” *Bloom*, 391 U.S. at 202. The scheduled fine approach subverts the “protection against the arbitrary exercise of . . . th[is] summary power,” *id.*, provided by the Constitution's criminal due process provisions.⁸

B. *The Full Civil Settlement.* It is our submission that under *Gompers*, and under the reasoning of this Court's post-*Gompers* cases, a civil contempt sanction, as a sanction imposed in a civil proceeding to further the remedial interests of a civil complainant, by its nature ends with the full relinquishment through settlement of all the underlying remedial interests of that civil litigant. The Virginia Supreme Court's decision—empowering courts to take over fully settled civil contempt cases for independent prosecution by court-appointed officers—is in the plainest conflict with these decisions of this Court. See generally *Pet. Br.* 25-37. This conflict constitutes a compelling and entirely independent basis for reversal of the decision below.

1. The principal argument in the opposing briefs is that no federal question is even raised by the state practice at issue here because a state may adopt its own rules of mootness, which need not accord the same significance to civil settlements as is accorded by the federal law of mootness. It is emphasized in this regard that Article III (on which the federal law of mootness rests) has no

⁸ The government responds that a defendant can always appeal if actual judicial bias can be shown. *U.S. Br.* 17. But review for actual bias proceeds, as it must, under a very deferential standard in which a strong presumption of neutrality and good faith prevails. See *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). That being so appellate review for actual bias has never been deemed an adequate alternative to the fundamental safeguards of criminal procedure that the Constitution provides in cases which are in fact criminal. And, it has been precisely in order to avoid an “unseemly”, “improper”, and “misguided” process of case-by-case policing of judicial motives that this Court has formulated the rules stated in *Gompers* and *Hicks* on which we rely. See *Hicks*, 485 U.S. at 635.

application to the states. *See* Resp. Br. 28-32; U.S. Br. 22-25.

As we have previously stated in response to the same argument, we do not advocate applying the federal law of mootness to the states, but *only* this Court's law of constitutional due process and the distinction between criminal and civil contempt that forms the base for that law in this context. *See* Pet. Reply Br. (on petition) 6-7.

This Court has been unmistakably clear that, in passing on state contempt proceedings, "the characterization of [a] proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law." *Hicks*, 485 U.S. at 630.

This Court has also consistently and repeatedly emphasized that the characterization of a contempt order as civil in nature or criminal in nature for constitutional purposes turns on whether the order can be more properly characterized as "*remedial, for the benefit of the [civil] complainant*" (and therefore civil) or "*punitive, to vindicate the authority of the court*" (and therefore criminal). *Hicks*, 485 U.S. at 631 (quoting *Gompers*, 221 U.S. at 441) (emphasis added).

And, this Court has also long made clear that "[w]here a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character. . . ." *Penfield Co. v. SEC*, 330 U.S. 585, 591 (1947); *see Hicks*, 485 U.S. at 638.

The sum of these *federal due process principles* is that a state is *not* at liberty to include in a contempt order generated by *purely civil proceedings* any provision which renders a civil defendant subject to sanctions that bear *no relation* to the remedial interests of the civil complainant, and that instead operate *solely* to vindicate the authority of the court.

Nonetheless, the Virginia court held that a trial judge may, at his discretion, include in a contempt order that was generated by purely civil proceedings a rule that operates *solely* for the court's vindication, and that relates not at all to *any remedial interests*: viz., the rule that contempt sanctions continue to operate against a defendant, even after the complainant's full relinquishment of all remedial interests in the order, so that the judge may ensure that his public authority is vindicated. Petitioners—who never received the criminal procedure protections that the Constitution affords to criminal contempt defendants—thus face a purely punitive (and therefore criminal) sanction. The Virginia law in this regard violates petitioners' constitutional due process rights.⁹

⁹ In all of the opposing briefs, the only attempt to justify the rule of the court below in terms of any purpose other than the vindication of the public authority of the courts appears in one brief paragraph in the government's brief, which argues that the rule below should be understood as merely an effort to treat the state entities that would receive the fines and "were affected by petitioners violations of the injunction . . . as though they were parties to the case." U.S. Br. 24. This argument—which has never been urged by respondent—fails on its own terms:

First, this rationale played *no role whatsoever* in the decision or judgment of the Virginia Supreme Court, which instead explicitly rested the rule in question on the public interest in vindicating the authority of the courts. *See* Pet. App. 17a.

Second, the rule in question does not treat the state entities "as though they were parties to the case." The fines at issue were assessed without any evidence of or reference to the views of these entities or the specific costs these entities incurred. None of these entities ever intervened in these proceedings, and none ever sought or defended these fines. Indeed, the two counties at issue expressly notified the trial court that they *had no objection to the vacating of the fines*. J.A. 48-49, 54.

Finally, in refusing to vacate these fines, the trial judge made clear that he viewed the matter as one involving the court's interests and prerogatives, and the court's role in vindicating public justice, and was thus a matter subject to *his* discretion, rather than one involving the *rights* of the counties or of any other state entity. J.A. 37, 54-56, 60.

Against all this, respondent repeatedly asserts that *Gompers*' holding with respect to the effect of a full settlement of the underlying civil case on outstanding civil contempt sanctions is no more than a narrow federal mootness decision. Although we have already discussed this point at length, it is worth highlighting once again the inseparable relationship between *Gompers*' discussion of the constitutional distinction between civil and criminal contempt and *Gompers*' holding regarding the effect of a full civil settlement on civil contempt sanctions ancillary to that settled civil case.

First, *Gompers* recognizes that the distinctions between civil and criminal contempts "involve [the] substantive rights and constitutional privileges" of a defendant. 221 U.S. at 444. This being so, a contempt sanction that operates as a criminal sanction may be "properly imposed only in a proceeding instituted and tried as criminal contempt," in a manner consistent with constitutional criminal due process. *Id.*

Second, *Gompers* understands civil contempt as an ancillary proceeding to an underlying civil action designed to vindicate the rights of the civil complainant. See 221 U.S. at 441. As such, "[t]here is nothing in the nature of a criminal suit or judgement imposed for public purposes" about it. *Id.* at 445. It is for that reason that constitutional criminal procedures are not required.

Third, *Gompers* reasons that since the legitimacy of a civil contempt proceeding depends on its remedial nature—as a part of the underlying civil action—the civil contempt complainant is "not only the nominal, but the actual party on the one side, with the defendants on the other," and the complainant must be treated as acting "in its own right in an equity cause, and not as a representative of the [government or the court] prosecuting a case of criminal contempt." *Id.* at 445.

And, finally, *Gompers* drew the lesson from the foregoing that, precisely because the remedial interests of the

complainant that justify civil contempt expire with a full settlement of the underlying civil dispute between the complainant and the defendant, at that "juncture the complainant does "not requir[e], and . . . [is] not entitled to any compensation or relief of any other character." 221 U.S. at 451-452.

It is for that reason that the force of any civil contempt sanction obtained by a complainant "necessarily end[s] with the settlement of the main cause of which it was a part." 221 U.S. at 452. The *Gompers* opinion, then, provides a constitutional due process rationale for this rule—which assures that criminal contempt sanctions cannot be imposed without criminal procedures—and *not* a "narrow [federal] mootness rationale."¹⁰

2. Respondent next argues that, even if *Gompers* cannot be understood as a federal mootness case, its rule should have no application to this case, since the civil contempt sanction in *Gompers* was "compensatory" and the sanction here is "coercive." In essence, respondent argues that "coercive" civil contempt sanctions—unlike "compensatory" sanctions—need not be focused on serving the remedial interests of the complainant. See Resp. Br.

¹⁰ Although the United States' brief claims that this Court has "repeated[ly]" described *Gompers* as based on a "narrow mootness rationale" (U.S. Br. 23), there is no decision of this Court that so states. The three decisions cited by the government, in the course of making a passing reference to *Gompers*, use the word "moot" to describe the effect of settlement on an outstanding civil contempt judgment. See *id.* (citing cases). As shorthand, that summation of the *Gompers* rule is fair enough. But, there is nothing in any of these decisions that so much as suggests that the Court had the larger purpose of using the term to redefine the *Gompers* rule as one that rests on "narrow" federal procedural considerations rather than on the fundamentally distinct natures of civil contempt and criminal contempt. Indeed, the full discussion of *Gompers*' holding and rationale in *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452-53 (1932) makes it clear that the *Leman* Court read *Gompers* in the latter way. And as this Court has repeatedly emphasized, the distinct natures of civil and criminal contempts have constitutional significance. See pp. 1-5, 12, 14, *supra*; *Hicks*, 485 U.S. at 630; Pet. Br. 28-31.

33-36. But, in *Gompers*, and in numerous subsequent cases, this Court has emphasized that civil contempt sanctions—whether “compensatory” or “coercive” in nature—are legitimate only *when the sanctions further remedial purposes, for the benefit of the civil complainant.*¹¹

Indeed, far from retreating from this understanding, subsequent cases of this Court have clearly applied it. *Shillitani v. United States*, 384 U.S. 368, 371-372 (1966), involved a coercive civil contempt sentence of imprisonment (in that case, a determinate sentence with a purge clause) for refusing to testify before a grand jury. The *Shillitani* Court held that the sentence must be terminated—even though the judgment of sentence *had* been issued, the full sentence had *not* been served, and the defendant had *not* complied with the order—when, as a result of a subsequent event (the end of the grand jury), continued enforcement of the sanction would no longer serve the remedial purposes that justified the civil sentence. *Id.* (“[o]nce the grand jury ceases to function, the rationale for civil contempt vanishes”). This holding controls the present case.

¹¹ *Gompers* discusses at length the paradigm of the coercive civil sanction, the civil prison sentence, and, in so doing, *Gompers* could not be more clear that in this—as in any—civil contempt context the defendant’s noncompliance with the court’s order “is treated as being . . . in resistance to the opposite party [rather] than in contempt of the court.” 221 U.S. at 442. And the sanction is “not to vindicate the authority of the law, but is remedial . . . for the benefit of the complainant.” *Id.* (emphasis added). The cases subsequent to *Gompers* have hewed to this understanding of “coercive” civil contempt. See, e.g., *Hicks*, 485 U.S. at 631; *Shillitani*, 384 U.S. at 371-372; *Penfield v. SEC*, 330 U.S. at 590.

Respondent and the government rely on a quote from *Mine Workers* which states that various rules regarding “compensatory” civil sanctions do not apply to “coercive” civil sanctions because “where the purpose is to make the defendant comply, the court’s discretion is otherwise exercised.” See Resp. Br. 33; U.S. Br. 24. But this passage begins a discussion of how a court may set the amount of a civil or criminal “coercive” contempt fine and concludes that the court need not follow a compensatory rationale. See 330 U.S. at 304-305. The opinion at no point implies that a “coercive” civil fine can validly operate in a manner unrelated to the remedial purposes which justify the civil proceeding.

3. In a variation on a theme first heard in *Shillitani*, respondent seeks refuge in the proposition that the civil or criminal nature of a contempt sanction should be determined “at the time the prospective sanction is announced” so that civil fines, “legitimate when made,” are not “transmogrified into criminal sanctions” by “later occurring events over which the court has no control (such as . . . settlement).” Resp. Br. 34.

In *Shillitani*, the respondent argued for the continued enforcement of the civil sentences of imprisonment after their remedial purposes had expired, raising the same objection that respondent raises here: that the sentences were valid civil sanctions when issued, and “the length of imprisonment [should not] depend[] upon fortuitous circumstances, such as the life of the grand jury and when a witness appears.” 384 U.S. at 372. This Court rejected that argument and held that a civil sanction could not extend beyond its justifying remedial need:

Having sought to deal only with civil contempt, the District Courts lacked authority to imprison petitioners for a period longer than the grand jury Once the grand jury ceases to function, the rationale for civil contempt vanishes. [*Id.* at 371-372.]

Indeed, this Court declared that such an “objection . . . has no relevance to the [civil contempt] situation,” and “would apply only to unconditional imprisonment for punitive purposes.” *Id.*¹²

¹² As *Shillitani* demonstrates, the central issue here is *not* whether a court’s legitimate prior actions are “transformed” into illegitimate actions by the passage of time and the actions of others. Rather, it is whether civil contempt sanctions may, at the judge’s discretion, continue to operate against a defendant even after the remedial interests the sanctions were designed to serve are entirely spent, and even when the *only* purpose served by their continued operation is to punish the defendant in order to vindicate the court’s authority. Viewed in that frame, such a rule of contempt sanctions—whether judged when it is announced or when enforced against a defendant—cannot be reconciled with this Court’s civil contempt jurisprudence.

4. At this point, respondent recognizes what he so steadfastly denied in his discussion of the mandatory/prohibitory dichotomy: *viz.*, that virtually all contempt sanctions “inevitably” serve the mixed purposes of remedying a complainant’s injury and of vindicating the court’s authority. Resp. Br. 35. That being so, says respondent, the fact that the Virginia “survivability” rule serves to vindicate the court’s authority is not fatal. This trivializes what this Court has said.

This Court, in recognizing that contempt sanctions often have “incidental effects” that intermix remedial and punitive purposes and effects, has required deeper analysis to determine whether the operation of a particular sanction is properly characterized as civil or criminal. And, on that analysis, a rule providing that outstanding “civil” contempt sanctions continue after *all* remedial justifications are spent, is one that cannot be classified as civil.¹³

¹³ The United States argues that civil contempt orders can *solely* “serve[] to vindicate the court’s authority.” U.S. Br. 25. But none of the cases cited by the government are to that effect.

First, the government argues that a civil contempt need not “benefit a private complainant,” but may instead benefit “the public at large or the government as their representative.” *Id.* But each of the cases cited by the government involved the government as a *civil litigant*, and emphasized that the contempts were civil *only* because the government interests being vindicated were those of a civil litigant, and were *not* related to the general “vindication of public justice.” See *McCrone v. United States*, 307 U.S. 61, 63-65 (1939); *Mine Workers*, 330 U.S. at 302.

Second, the government argues that vindication of a court’s authority through civil sanction is common when “courts . . . impose civil sanctions on litigants who abuse their processes.” U.S. Br. 25. But each case cited involves sanctions that unambiguously operate in a remedial manner—serving directly to benefit the civil litigant injured by the wrongful conduct—and bear no resemblance at all to traditional criminal fines. See *NHL v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (dismissal of civil suit with prejudice as sanction for discovery abuses); *Chambers v. NASCO*, 111 S. Ct. 2123 (1991) (award of other side’s attorneys’ fees as sanction for abuse of proceedings); *McComb v. Jacksonville Paper Co.*, *supra*, 336 U.S. at 194-195 (award of backpay on expedited basis in response to employer’s refusal to cooperate in backpay proceeding).

5. As a last resort, respondent embraces the rationale of the decision below: “To remove from a state court the power to collect coercive civil sanctions after settlement of the underlying dispute, would utterly eviscerate the efficacy of civil contempt sanctions . . . [leaving contemnors] “above the law” . . . [and with] every incentive to flout [a] court’s orders.” Resp. Br. 36-37 (internal cite omitted). *Compare* Pet. App. 17a.

This is unadulterated hyperbole. Even if one ignores for the moment the availability of criminal contempt sanctions to vindicate the court’s authority—as respondent and the court below would do—the pressures brought to bear on a defendant by the imposition of severe civil sanctions are substantial.¹⁴

But the ultimate refutation of this alarmist argument is that *criminal contempt sanctions are at any—and every—point very much available to a court faced with contempt, regardless of any private settlements.* See *Gompers*, 221 U.S. at 451-52. And it is this Court’s clear jurisprudence that it is the office of *criminal* contempt—not civil contempt—to vindicate the public’s interest in the authority of the courts.

C. - The Sum of the Matter. In the end, all respondent’s arguments come down to the refrain that the dignity of the law and the authority of the courts are jeopardized by criminal contempt procedures. This is an unworthy argument that this Court has squarely rejected:

We cannot say that the need to further respect for judges and courts is entitled to more consideration

¹⁴ A complainant may, after all, proceed quite differently from the complainants below and aggressively seek to collect civil contempt fines promptly—whether compensatory or coercive—in order to maximize that pressure. And, of course, a complainant may choose not to settle the underlying dispute on any terms other than those that fully vindicate all of its remedial rights and interests as the complainant has defined those rights and interests. The notion that in the face of such forces a contemnor has “every incentive to flout [a] court’s order” has nothing to do with reality.

that the interest of the individual not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries. [*Bloom*, 391 U.S. at 208.]

In this case, this argument should be rejected once again.¹⁵

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

¹⁵ We demonstrated in our opening brief that, in evaluating the claims that the \$52 million in civil contempt fines imposed upon them violates the Excessive Fines Clause and the Due Process Clause, the Virginia Supreme Court failed to address the former claim on the ground—subsequently shown to be erroneous—that the federal constitutional limits on excessive fines do not govern civil contempt fines, *see Austin v. United States*, 113 S. Ct. 2801 (1993), and dismissed the latter claim with a refusal to perform the constitutional analysis required by this Court's precedents, *see TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

It suffices to add two points. First, contrary to respondent, this Courts' analysis of the constitutional limits on punitive damages awards in tort cases is applicable here. Accepting respondents theory that these fines are coercive civil contempt fines, the fines most assuredly serve the same function as punitive damages in our civil system—to deter identified wrongful behavior that also might, but need not, rise to the level of criminal conduct. Second, both respondent and the government attempt to fill in for the Virginia court by locating record citations that might support that court's ultimate legal conclusion. But, particularly in light of the approach this Court took in *Austin*, the application of the proper constitutional test is surely a matter for the Virginia court in the first instance. Thus, if necessary in light of the disposition of the first two questions presented, this case should be remanded for reconsideration by the court below.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, ET AL.,
PETITIONERS

v.

JOHN L. BAGWELL, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a court that adopts a prospective schedule of fines to coerce compliance with a "prohibitory" injunction may, upon violation of that injunction, impose those fines in a civil proceeding.
2. Whether a court's refusal to vacate civil contempt fines upon settlement of the underlying litigation renders those fines criminal in nature.
3. Whether the imposition of approximately \$52 million in civil contempt fines is excessive as a matter of law, irrespective of the facts.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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PETITIONERS

v.

JOHN L. BAGWELL, ET AL.

*ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

The Supreme Court of Virginia in this case upheld the use of a prospective schedule of civil contempt fines to coerce compliance with a "prohibitory" injunction, and held that the fines survived settlement of the underlying case and were not unconstitutionally excessive. Because of the vast range of its litigation, the United States is interested in the proper classification of sanctions as "civil" or "criminal." In addition, federal fines and forfeitures are subject to challenge as excessive. Finally, federal labor policy favors measures that promote the collective bargaining process and the peaceful settlement of labor disputes.

STATEMENT

1. On April 4, 1989, petitioners—the International Union, United Mine Workers of America, and its District

28—called a strike against respondents Clinchfield Coal Company and Sea “B” Mining Company (the Companies). Pet. App. 26a. The Companies continued operations with replacement workers.

On April 12, 1989, the Companies sued petitioners in Virginia state court, alleging that petitioners were committing unlawful acts in connection with the strike. Pet. App. 2a. On the following day, after an evidentiary hearing, the court issued an order which (as amended on April 21) enjoined petitioners, their agents, and members from, *inter alia*, obstructing ingress and egress at the Companies’ facilities, throwing objects at persons employed by or performing services for the Companies, placing tire-damaging devices on roads, and picketing in greater than specified numbers. The injunction also required petitioners to use all lawful means reasonably available to ensure compliance with its terms, to place an agent at each picket site to supervise picketers’ activities, and to report all violations to the court. *Id.* at 113a-121a.

Petitioners thereafter “engaged in wholesale violations of the court’s injunction.” Pet. App. 2a. Over the course of the strike, the violations grew to include numerous instances of violence, such as “gunfire directed at coal drivers’ vehicles,” *id.* at 5a, “physical beatings and death threats,” *id.*, at 7a, rock-throwing, tire-puncturing, and other attempts to attack or intimidate company personnel, their families and members of the community. *Id.* at 4a-6a, 44a. On May 18, 1989, the court found that petitioners had committed 72 violations of the injunction since it was entered. The court responded by establishing a schedule of fines for future violations, under which a \$100,000 fine would be levied for each violation involving violence, and a \$20,000 fine would be levied for each day in which petitioners committed specified nonviolent violations. *Id.* at 4a, 111a.

Petitioners continued to violate the injunction notwithstanding the May 18 order. On June 7, 1989, following

a hearing, the court found beyond a reasonable doubt that petitioners had intentionally violated the injunction on a number of occasions, and it levied fines totalling \$2,465,000 against them in accordance with the May 18 schedule. The court also substantially increased the fines for future nonviolent violations. Pet. App. 4a, 103a-105a.

Despite the steep increases in prospective fines, petitioners continued to disobey the injunction. The court accordingly cited petitioners for contempt on six separate occasions between June and November 1989—each time finding beyond a reasonable doubt that numerous violations had occurred—and it imposed fines generally in accordance with the revised schedule. Pet. App. 4a-7a, 55a-101a. Because petitioners “strenuously objected” to any payments to the Companies, and in light of the law enforcement pressures placed on the communities affected by the strike, the court ordered the bulk of the fines paid to the clerk of court for the benefit of the Commonwealth of Virginia and the two counties “most heavily affected by the unlawful activity.” *Id.* at 44a-45a, 104a.

In January 1990, petitioners and the Companies reached an agreement settling their labor dispute. Pursuant to that agreement, petitioners and the Companies asked the court to dismiss the complaint and to vacate all contempt fines. In September 1990, the court dismissed the lawsuit, dissolved the injunction, and vacated the fines owed to the Companies. The court declined, however, to vacate the fines owed to the state and county governments, and it appointed respondent Bagwell as a special commissioner to collect them. Pet. App. 50a-52a. The court noted that petitioners’ conduct had affected not only the Companies but also “members of the public * * * who had no connection with any of the litigants,” and that state authorities had mobilized massive resources to cope with strike-related disturbances. *Id.* at 44a-45a. Because the contempt orders were issued in large part to safeguard the rights of the law-abiding public, and because the state entities who represented the public had

not consented to the settlement, the court declined to vacate any fines that were "payable in effect to the public." *Id.* at 44a-45a, 47a.

2. A divided panel of the Virginia Court of Appeals vacated all outstanding fines. Pet. App. 25a-37a. It observed that petitioners' violations of the injunction could "only be described fairly as massive," *id.* at 26a, and it assumed without deciding that the fines were civil, rather than criminal, in nature. *Id.* at 30a. Relying, however, on state-law principles (which it viewed as consistent with federal law), the court concluded that "civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the [trial] court is without discretion to refuse to vacate such fines." *Id.* at 36a.

3. The Supreme Court of Virginia reversed. Pet. App. 1a-20a. The court began by emphasizing the volume of undisputed evidence that established petitioners' contumacious behavior. *Id.* at 4a. The court then concluded that under Virginia law respondent Bagwell had standing, and the right to intervene as a party, to represent the interests of the state authorities in defending the validity of the fines. *Id.* at 7a-12a.

On the merits, the Supreme Court of Virginia first rejected petitioners' claim that the fines were criminal in nature, and that they therefore could be imposed only by following all of the procedures required by the Constitution in criminal proceedings. The court identified as the distinguishing feature of civil contempt in a case such as this the fact that the sanction is coercive—*i.e.*, that it is "conditional, and a defendant can avoid [it] by compliance with a court's order"—and rejected petitioners' contention that a civil contempt fine must in addition be imposed to bring about the performance of an *affirmative* act, rather than to ensure the non-occurrence of a *prohibited* act. Pet. App. 13a-15a.

The court next concluded that "the subject fines were not mooted by the parties' settlement of the underlying strike and litigation." Pet. App. 20a. The court observed that the mootness issue was "governed by state law," and explained that acceptance of petitioners' position would allow parties in petitioners' position to disobey coercive measures secure in the knowledge that ultimate settlement of the action would relieve them of liability. *Id.* at 17a. Finally, the court rejected petitioners' claim that the fines were so excessive as to violate substantive due process and federal labor policy. The court observed that, "considering [petitioners'] vast financial resources and the magnitude of the injunction violations we cannot say that [the fines] are excessive as a matter of law." *Ibid.*¹

SUMMARY OF ARGUMENT

A. This Court has repeatedly recognized that the difference between civil and criminal contempt turns on whether the proceeding is primarily remedial, or primarily punitive. The Court has used the same test in determin-

¹ On May 16, 1989, the National Labor Relations Board (NLRB) filed an action against petitioners in federal court under Section 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(j). That action, based on unfair labor practice charges filed against petitioners, resulted in the issuance on June 7, 1989, of an injunction against petitioners. When petitioners disobeyed that injunction, the district court held them in contempt and, like its state counterpart, adopted a schedule of fines applicable to future violations. *Clark v. International Union, UMWA*, 752 F. Supp. 1291, 1293-1294 (W.D. Va. 1990). Petitioners continued to violate the federal injunction repeatedly and, after several contempt hearings, the district court fined them a total of \$960,000, payable to the United States. *Id.* at 1294-1295 & n.6. The NLRB and petitioners later settled the charges underlying the federal injunction. Petitioners then moved for an order vacating the fines, a motion that was granted only as to the fines imposed before the prospective fine schedule was announced. *Id.* at 1302. Petitioners appealed to the Fourth Circuit, but that appeal was dismissed by agreement of the parties and petitioners ultimately paid the fines in full.

ing whether legislatively imposed sanctions must be classified as civil or criminal—a defendant is entitled to the procedural protections required for criminal cases only if the sanction he faces amounts to “punishment” in the constitutional sense and cannot be justified as serving remedial ends. The “mandatory” or “prohibitory” character of a standard of conduct (whether that standard is announced by a court or enacted by a legislature) has never been thought dispositive on the criminal or civil nature of the proceedings under the Constitution. Because the fines imposed here were clearly designed to coerce petitioners into complying with remedial court orders, and because petitioners could easily have avoided those fines by complying with those orders, the fines were not punishment in the constitutional sense, and were properly imposable in civil proceedings.

B. That conclusion is not changed by the fact that the Virginia courts held that the civil contempt fines imposed here survived the settlement of the original controversy between petitioners and the Companies. Petitioners rely on *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), for the proposition that settlement requires vacatur of previously imposed civil contempt fines, but that case turned on this Court’s finding that the original controversy was moot under Article III of the Constitution, a provision that is not applicable to the States. In any event, no civil fines had actually been awarded in *Gompers*, and the only relief that could have been awarded was compensatory, not coercive. Since *Gompers*, this Court has explained that compensatory civil contempt fines must be vacated upon settlement, but that “the court’s discretion is otherwise exercised” when the civil contempt fines are purely coercive. *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947).

C. Petitioners have not shown that the fines imposed in this case are excessive as a matter of law under due process standards. Petitioners claimed in the Virginia

Supreme Court only that the fines were so large as to “jar the conscience,” without attempting to offer particular reasons as to why that was so, or to support their claim by reference to the record. Because petitioners’ argument amounted merely to a claim that the sheer size of the fines rendered them impermissible under any conceivable state of facts, it was correctly rejected. To the extent petitioners preserved any Eighth Amendment argument, it was framed in the same terms and it fails for the same reason.

ARGUMENT

THE CONTEMPT PROCEEDINGS AGAINST PETITIONERS WERE PROPERLY CHARACTERIZED AS CIVIL IN NATURE, AND THE RESULTING FINES DO NOT EXCEED CONSTITUTIONAL LIMITS

This case involves the remaining consequences of a contentious strike that was marked by petitioners’ repeated violations of state and federal court injunctions. The labor dispute ultimately was settled between the parties, and the NLRB and petitioners settled the unfair labor practice charges arising out of the strike (see note 1, *supra*). Voluntary resolution of disputes is strongly favored in the law, as it serves not only the interests of parties but also those of judicial economy. See, e.g., *Marek v. Chesny*, 473 U.S. 1, 5, 10 (1985); Fed. R. Civ. P. 68. That interest is especially strong in the labor field, where work stoppages can be enormously disruptive to the Nation’s economy.

Federal labor policy favors collective bargaining as a peaceful means of resolving labor disputes. In order to promote that goal in the long term and as a general matter—and to facilitate restoration of ruptured collective bargaining relationships—it will often be appropriate for a court to reduce or vacate civil contempt fines that were imposed for violation of court orders entered during the heat of the dispute, especially if the parties concerned request that disposition. At the conclusion of the instant dispute, for example, although the NLRB did not join petitioners in asking that the civil fines entered by the

federal court be vacated, it did not oppose that action, and the special mediator appointed by the Secretary of Labor to assist in settling the labor dispute urged the state court to grant the joint motion filed by petitioners and the Companies to vacate all outstanding fines against petitioners. See J.A. 48-49.

At the same time, violence and other illegal conduct sometimes associated with strikes can be enormously disruptive to the public interest and the local communities involved, and courts considering whether to vacate or reduce fines already assessed and owing may properly be concerned with ensuring that such conduct is not encouraged in the future. These competing considerations are, in the end, addressed to the sound discretion of the court, informed by the views of the parties and the broader perspective and expert judgment of the public officials having responsibilities in the circumstances.

There is no occasion for the Court to consider in this case whether (or in what manner) principles of federal labor policy must inform the discretion of a state court in a case such as this, because petitioners have not argued that federal labor policy required the state court, at the conclusion of the underlying labor dispute, to vacate or reduce the fines it already had levied against petitioners. Similarly, although petitioners argued below that the fines were excessive as a matter of federal labor policy, the Virginia Supreme Court rejected that contention, Pet. App. 18a-19a, and petitioners have not renewed it in this Court. Petitioners have instead chosen to challenge the remaining fines only on constitutional grounds. The importance of those issues transcends this labor dispute, and their resolution may affect a broad variety of enforcement actions in such areas as labor relations and employee health, safety and economic security, in which the NLRB, Department of Labor and other agencies seek similar civil contempt fines.

While in the abstract "particular acts do not always readily lend themselves to classification as civil or crim-

inal contempt," *McCrone v. United States*, 307 U.S. 61, 64 (1939), this case does not present any factual disputes that might render such classification difficult. Petitioners did not seek review of the factual findings of the Virginia courts, nor of those courts' conclusion that, on the facts presented by this record, petitioners were properly held liable for the conduct of their members. As the case comes to this Court, therefore, it must be assumed that, with full knowledge of the injunction and of the sanctions previously announced by the court, petitioners elected to engage in large-scale (and often violent) violations of the order. In our view, on the facts found by the Virginia courts, nothing in the United States Constitution precluded those courts from sanctioning petitioners' conduct in civil contempt proceedings and from retaining the fines in effect following resolution of the labor dispute and related litigation.

A. The Mandatory or Prohibitory Character Of A Court's Order Is Not Dispositive In Deciding Whether Violations May Result In Civil, Rather Than Criminal, Contempt Proceedings

1. This Court has long held that the distinction between civil and criminal contempt turns on the character and objective purpose of the action. See, e.g., *Hicks v. Feiock*, 485 U.S. 624, 632-635 & n.7 (1988); *Shillitani v. United States*, 384 U.S. 364, 368 (1966); *Lamb v. Cramer*, 285 U.S. 217, 220-221 (1932). A sanction is civil if its purpose is primarily remedial. As the Court explained in *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947):

Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based

upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

Accord *Shillitani v. United States*, 384 U.S. at 370; *Spallone v. United States*, 493 U.S. 265, 276 (1990). Criminal contempt, by contrast, is "a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). In other words, criminal contempt is the exaction of retribution in "vindication of the public justice," *Fox v. Capital Co.*, 299 U.S. 105, 108 (1936), whereas civil contempt is "a sanction to enforce compliance with an order of the court." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

This Court's cases thus establish that the key question in distinguishing civil from criminal contempt is whether the sanction at issue is properly characterized as primarily remedial or primarily punitive. The Court's opinion in *Shillitani* illustrates the point. In that case, the defendants were each sentenced to two years' imprisonment, with a proviso that those sentences would last only so long as the defendants continued to defy a court order that they testify before a grand jury. 384 U.S. at 365. The Court acknowledged that "any imprisonment, of course, has punitive and deterrent effects," but held that imprisonment "must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." *Id.* at 370. The Court therefore held that "the conditional nature of the[] sentences render[ed] each of the[] actions a civil contempt proceeding, for which indictment and jury trial [were] not constitutionally required." *Id.* at 365.

The Supreme Court of Virginia correctly concluded that the contempt fines in this case were civil under these principles. The trial court's orders—which established prospective schedules and then assessed fines for subsequent violations—were designed to compel petitioners' future compliance with its injunction. They were not an attempt to exact retribution for past conduct that society has made criminal. As in *Shillitani*, "if * * * petitioners had chosen to obey the order they would not have faced" the fines. 384 U.S. at 368. The conditional nature of the prospective fines demonstrates the civil nature of those fines when they were later assessed.

2. Petitioners contend (Br. 11-25) that the contempt sanctions at issue here must nevertheless be deemed criminal because the underlying injunction was "prohibitory"—it ordered petitioners to refrain from doing certain things. In petitioners' view, only a "mandatory" injunction—one that commands the performance of "an affirmative act"—may constitutionally be enforced through civil contempt. That "mandatory/prohibitory" dichotomy is claimed to have been established in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), and to have been followed in a line of precedent culminating in *Hicks v. Feiock*, 485 U.S. 624 (1988). In the contempt setting, however, "one who challenges the State's classification of the relief imposed as 'civil' or 'criminal' may be required to show 'the clearest proof' that it is not correct as a matter of federal law." *Id.* at 631. Petitioners have failed to carry their burden of showing that the distinction they advocate has been, or should be, adopted by this Court as a rigid test for distinguishing civil from criminal contempt.

a. While petitioners place great emphasis on the Court's reference to "an affirmative act" in *Gompers*, and the repetition of that language in *Hicks*, they wrest that language from the context in which it appears. That context suggests that the *Gompers* Court was emphasizing the traditional distinction between orders that are primar-

ily punitive and those that are remedial, including as the principal example of the latter category those that seek to coerce the defendant into complying with a court order. 221 U.S. at 443. Consistent with that approach, *Hicks* emphasizes that "[t]he critical feature that determines whether the remedy is civil or criminal in nature is * * * whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order." 485 U.S. at 635 n.7.

Indeed, far from supporting petitioners, *Gompers* disproves their claim that prohibitory injunctions cannot give rise to civil sanctions. The injunction at issue in *Gompers* was prohibitory—it ordered the defendants not to engage in boycott activities. 221 U.S. at 435-436. The injunction was not, however, coercive, because it did not specify in advance what sanction would follow a violation. The Court concluded that violations of that prohibitory injunction *could* support civil contempt, but that the only appropriate remedial action in the circumstances would have been "to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience." *Id.* at 444. The Court did not suggest, much less hold, that had the trial court earlier established a schedule of coercive fines in aid of the injunction, the subsequent imposition of those fines upon a violation would have been punitive rather than remedial.

Other cases also suggest that the distinction petitioners invoke lacks talismanic significance. In the leading case of *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904), on which *Gompers* extensively relied (see 221 U.S. at 441, 443, 444, 450, 452), the Court noted that criminal contempt is "like an ordinary crime which affects the public at large," 194 U.S. at 329, and contrasted it with civil contempt:

On the other hand, if in the progress of a suit a party is ordered by the court *to abstain from some action* which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty

of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding.

Ibid. (emphasis added). See also *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948) (civil contempt is "[t]he procedure to enforce a court's order commanding *or forbidding* an act") (emphasis added); *Leman v. Krentler-Arnold Co.*, 284 U.S. 448, 452-456 (1932) (civil contempt for violations of injunctions prohibiting patent infringement). And in *United Mine Workers*, the Court specifically approved the use of civil contempt fines to compel compliance with orders prohibiting the defendants from, *inter alia*, publicizing their claim that their employment agreement was no longer in force or otherwise interfering in any way with the operation of coal mines in the government's possession. 330 U.S. at 266 n.12, 269, 304-305. See also *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 434-435, 442-443 (1986) (upholding, as civil, contempt fines imposed for violations of decrees prohibiting violations of civil rights laws); *McComb v. Jacksonville Paper Co.*, 336 U.S. at 191-192 (violations of FLSA's minimum wage, overtime, and record-keeping provisions).

Petitioners contend (Br. 20) that there is something specially "criminal" in the imposition of sanctions for completed violations of a *coercive* court order because, by the time the sanctions are imposed, the contemnor no longer has it within its power to avoid the sanctions altogether by complying with the court's order. That, however, is also true in analogous cases involving imprisonment as a civil sanction designed to coerce compliance with a court order, on which petitioners rely in asserting (Br. 18, 24) that the contemnors in civil contempt must always "carry the keys of their prison in their own pockets," *Hicks*, 485 U.S. at 633. As the federal district court pointed out in the parallel injunctive action brought against petitioners by the NLRB, although a person can avoid *future* imprisonment by complying with the order, whatever time he has already been imprisoned prior to compliance is "irretrievable." *Clark*, 752 F. Supp. at 1301.

Similarly here, although petitioners always retained the ability to avoid future fines by complying with the injunction, it does not follow that they must also at all times retain the authority to avoid, on a retroactive basis, coercive civil fines for which they have already been found liable. *Ibid.*

Moreover, while there are significant differences between compensatory and coercive civil contempt proceedings, see *United Mine Workers*, 330 U.S. at 303-304, the trait petitioners identify is common to both and brands neither as uniquely criminal. A compensatory civil contempt proceeding typically involves two steps: (1) the issuance of an order requiring certain conduct or forbearance, and (2) in the event of a violation, the exaction of compensation for the benefit of the injured party. A coercive contempt proceeding typically involves three distinct steps: (1) the issuance of the original court order, (2) in the event of disobedience of that order, the issuance of a second order finding the recalcitrant party in contempt and threatening to impose a specified fine or other sanction unless he purges the contempt, and (3) imposition of the threatened sanction if the purgation conditions are not fulfilled. See, e.g., *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The last step of each proceeding—compensatory or coercive—is identical with respect to the contemnor's inability to avoid a penalty at that time. Because *Gompers* demonstrates that imposition of a fine as the last step of the former proceeding does not render it "criminal," there is no reason for a contrary conclusion with respect to the last step of the latter.

In light of the Court's teaching in *Gompers*, it is hardly surprising that the lower federal courts uniformly have rejected the contention that contempt fines, in order to be civil, must be perpetually subject to avoidance, even after they have accrued and been reduced to judgment. As the Ninth Circuit has explained:

[I]nvariably, wherever a compliance fine is assessed and an opportunity [is] given to purge, the failure to

purge will bring about a due date. The due date occurs because the actor has failed to use the key to the jail which the court provided. The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

Hoffman v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1273 (1976). Accord *NLRB v. Blevins Popcorn Co.*, 659 F.2d at 1185; *In re Grand Jury Proceedings*, 871 F.2d 156, 159 (1st Cir. 1989); *United States v. Darwin Construction Co.*, 873 F.2d 750, 754 (4th Cir. 1989); *United States v. Work Wear Corp.*, 602 F.2d 110, 115 (6th Cir. 1979).

b. The rigid mandatory/prohibitory distinction urged by petitioners is also inconsistent with the Court's cases distinguishing between civil and criminal sanctions in other contexts. The Court has repeatedly recognized that the government "may impose both a criminal and a civil sanction in respect to the same act or omission," *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984), and has upheld the civil character of fines imposed for a breach of varied statutory prohibitions. See, e.g., *United States v. Ward*, 448 U.S. 242, 245, 249-250 (1980); *Rex Trailer Co. v. United States*, 350 U.S. 148, 150-152 (1956); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-551 (1943). Those cases, like the contempt cases addressing the same question, focus on whether the challenged sanction may be characterized as primarily punitive, not on whether the rule violated by the defendant is in some sense "prohibitory." Indeed, this Court has looked to the principles announced in its civil contempt cases for guidance in deciding whether restrictions qualify as "punishment" in other contexts. See *Selective Service System v. Minnesota Public Interest Research*

Group, 468 U.S. 841, 852-853 (1984) (quoting *Shillitani*, 384 U.S. at 368) (statute denying school aid to those who fail to register for draft is not punishment under Bill of Attainder Clause, because burden can be avoided by registering and thus students "carry the keys of their prison in their own pockets").

The basic rule that emerges from this Court's cases is that a State may impose a wide variety of burdens on its citizens (including, in appropriate cases, imprisonment) if it does so for remedial or regulatory reasons; a State is required to follow the constitutional procedures for criminal prosecutions only when it seeks to impose "punishment" in the constitutional sense." *Bell v. Wolfish*, 441 U.S. 520, 535-537 & n.17 (1979); see also *United States v. Salerno*, 481 U.S. 739, 746-747 (1987); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-166 & n.20 (1963). Whether a sanction constitutes punishment in the constitutional sense is not to "be determined from the defendant's perspective," because "for the defendant even remedial sanctions carry the sting of punishment." *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989); see also *Wolfish*, 441 U.S. at 538 n.19. Instead, the "punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Salerno*, 481 U.S. at 747 (brackets omitted); see also *Wolfish*, 441 U.S. at 538-539; *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

An order directing a litigant not to engage in specified conduct that is concededly harmful to others, coupled with a prospective schedule of fines to be imposed in the event of noncompliance, is rationally related to the nonpunitive objective of safeguarding the rights of third parties. It therefore does not "amount[] to 'punishment' in the constitutional sense." *Wolfish*, 441 U.S. at 537. That conclusion does not depend in any way on the mandatory or prohibitory character of the court's order. The relevant question is whether the fines are reasonably related to the

goal of securing compliance with a remedial decree. The Virginia courts determined that the fines in this case, while admittedly large, were reasonably necessary to compel compliance with the injunction. See Pet. App. 18a-19a. On the basis of that determination, the fines were remedial and properly imposable in a civil proceeding.

Petitioners further suggest (Br. 13-14 & n.4) that contempt sanctions occupy a special place in the constitutional analysis because judges dealing with contemptuous conduct act as prosecutors and judges of their own cause, and therefore may exercise their authority arbitrarily. While we do not quarrel with the proposition that judicial authority, like all authority, can be abused, we do not see how that concern supports the mandatory/prohibitory distinction advocated by petitioners. Indeed, stated at such an abstract level of generality, use of that proposition as a test of the civil or criminal nature of a proceeding would result in the elimination of all civil contempt proceedings, to say nothing of the use of summary criminal proceedings for contempts committed in the court's presence, see, e.g., *United States v. Wilson*, 421 U.S. 309, 314-319 (1975), and the combination of prosecutive and adjudicative functions in administrative agencies, see, e.g., *Withrow v. Larkin*, 421 U.S. 35, 53-54 (1975). To be sure, "we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice," *id.* at 54, and a showing that the judge was actually biased would entitle a contemnor to a vacatur of any fines imposed. Cf. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-825 (1986). We note, however, that while petitioners sought recusal of the trial judge on grounds of bias, that claim was resolved against them by the state courts, Pet. App. 19a-20a, and petitioners have abandoned it in this Court. As the case comes to this Court, then, it is governed by the general rule that state officials are assumed to be persons "of conscience and intellectual discipline, capable of judg-

ing a particular controversy fairly on the basis of its own circumstances." *Withrow*, 421 U.S. at 55.²

c. At bottom, petitioners' reliance on the mandatory/prohibitory distinction appears to rest on the premise (Br. 22-25) that criminal and civil contempt proceedings must be mutually exclusive, and that petitioners' purported "test" is needed to keep courts from invoking civil contempt in preference to its criminal counterpart. Petitioners' exclusivity premise is faulty. Like petitioners, we assume that their conduct could have been made the subject of criminal contempt proceedings. It does not follow, however, that the court was compelled by the United States Constitution either to invoke criminal contempt or do nothing at all. As the Court explained in *United Mine Workers*, "[c]ommon sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures." 330 U.S. at 298-299.

d. As this Court has recognized in other contexts, the distinction between mandatory and prohibitory injunctions is often "illusory." *California v. American Stores*

² Nor do we believe that a designation of the proceedings in this case as criminal is warranted by the claim that the law of crimes has always been a law of prohibitions coupled with noncompensatory penalties. See Pet. Br. 22-23. Much the same can be said about the law governing punitive damages for tortious conduct, in which the Court has declined invitations to apply the full panoply of procedures that are constitutionally required in criminal cases. See, e.g., *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043-1046 (1991). In any event, the significance of any analogy to criminal statutes is overstated. In cases like this one, a court order (whether mandatory or prohibitory) is generally entered only after a formal adjudication of a particular controversy (which gives the defendant far more notice of the bounds of permissible conduct than is usually provided by a criminal statute), and a determination that the specific public or private rights at issue require more immediate and certain protection than can be provided by the general deterrent effect of the criminal laws. Ensuring that protection in the specific case for the benefit of the affected party is properly viewed as remedial.

Co., 495 U.S. 271, 282-283 & n.9 (1990). In most cases, a court can easily frame a mandatory injunction that commands the performance of such affirmative acts as will ensure the non-occurrence of prohibited conduct.³ To be sure, it might be said that a court can almost always frame an injunction in coercive terms as well. But the essence of our position is that the *form* of the injunction is not, and cannot be, *conclusive* on whether sanctions for its violation must be classified as criminal; in this area, as in others, the ultimate question is whether the sanctions are punishment in the constitutional sense. While a coercive fine nearly always will serve a remedial purpose, it remains open to any litigant to show that a particular fine is so extraordinarily disproportionate to the remedial purpose that assertedly justifies it as to be irrational—leading to the inference that the true purpose is the infliction of punishment. Cf. *Bell v. Wolfish*, 441 U.S. at 539 n.20; *Nixon v. Administrator of General Services*, 433 U.S. 425, 476 (1977) ("Where such legitimate * * * purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged * * * was the purpose of the decisionmakers.").

e. Acceptance of petitioners' contention that the "mandatory/prohibitory" distinction provides a constitutionally required test for classifying contempts as civil or criminal would seriously hinder enforcement of numerous congressional policies reflected in labor and other regulatory statutes. For example, the NLRB's remedial orders often require employers and labor unions to cease and desist from engaging in specified unfair labor practices, and the NLRB is authorized to seek enforcement of those orders in the courts of appeals pursuant to Section 10(e) of the NLRA, 29 U.S.C. 160(e). As this Court has recognized, Congress anticipated that contempt reme-

³ The distinction is especially elusive in this case, because petitioners' continuing pattern of violations of the injunction closely resembles the continuing failure by a defendant to comply with a mandatory injunction.

dies would be immediately available to the NLRB "in the event a renewal of the unfair practice occurs after the enforcement order." *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 569 (1950); see also *NLRB v. Warren Co.*, 350 U.S. 107, 112-113 (1955). Federal courts traditionally have responded to the renewal of previously enjoined unfair labor practices by imposing coercive, scheduled fines largely indistinguishable from those invoked by the state trial court in this case.⁴ Because the great bulk of the NLRB's cease-and-desist orders may plausibly be characterized as "prohibitory,"⁵ acceptance of peti-

⁴ *NLRB v. H & H Pretzel Co.*, 138 L.R.R.M. (BNA) 2888, 2893 (1990) (special master's report), adopted, 138 L.R.R.M. (BNA) 2976 (6th Cir. 1991) (\$10,000 per violation); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1259 (11th Cir. 1986) (\$10,000 per violation); *NLRB v. Lehigh Lumber Co.*, 109 L.R.R.M. (BNA) 2213, 2221 (1981) (special master's report), adopted, 109 L.R.R.M. (BNA) 2290 (3d Cir. 1981) (\$4000 per violation); *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d 326, 327 (6th Cir. 1979) (\$10,000 per violation); *NLRB v. Union Nacional de Trabajadores*, 611 F.2d 926, 934 (1st Cir. 1979) (\$10,000 per violation); *NLRB v. Local 85, Teamsters*, 101 L.R.R.M. (BNA) 2933, 2935 (9th Cir. 1979) (\$10,000 per violation); *NLRB v. Furtney d/b/a Mr. F's Beef & Bourbon*, 96 L.R.R.M. (BNA) 2191, 2202 (1977) (special master's report), adopted, 547 F.2d 575, 598 (D.C. Cir.), cert. denied, 431 U.S. 966 (1977) (\$6000 per violation); *NLRB v. Schill Steel Products, Inc.*, 480 F.2d 586, 599 (5th Cir. 1973) (\$5000 per violation); *NLRB v. Hickman Garment Co.*, 471 F.2d 611, 612 (6th Cir. 1972) (\$5000 per violation); *NLRB v. Local 825, IUOE*, 430 F.2d 1225, 1230 (3d Cir. 1970), cert. denied, 401 U.S. 976 (1971) (\$10,000 per violation); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 449 (D.C. Cir.), cert. denied, 346 U.S. 855 (1953) (\$30,000 per violation).

⁵ We are informed by the NLRB that during the last five years, it has sought civil contempt sanctions for violations of its judicially enforced orders in approximately 88 cases. In 58 of those cases, the NLRB alleged violations of enforced cease-and-desist orders and sought imposition of a prospective fine schedule. In addition, during the same five-year period, the NLRB authorized 37 petitions for civil contempt of injunctions issued pursuant to Sections 10(j) and 10(l) of the NLRA, 29 U.S.C. 160(j) and 160(l), of which 30 involved contempt of prohibitory provisions. There are currently in effect more than 200 civil contempt orders—in which the court has directed the contemnor to cease and desist from specified con-

tioners' argument would in most cases remit the government to the criminal process for enforcement—a course that would completely nullify Congress's judgment that many labor problems require regulation by a specialized administrative agency.⁶ This Court's cases do not require such a radical departure from current practices.⁷

Criminal sanctions are not lightly to be invoked, see *United States v. Lovasco*, 431 U.S. 783, 794-795 & n.15 (1977), and they carry awesome consequences when employed, for they subject those affected to particular opprobrium within their communities. Not surprisingly, regulated parties ordinarily prefer that any enforcement action—including contempt proceedings—do not brand them as criminals. For these reasons, the Court has made clear that, in accordance with the principle of contempt law that "a court must exercise '[t]he least possible power adequate to the end proposed,'" *Shillitani*, 384 U.S. at

duct—that impose prospective fines in the event of future violations. In the case of egregious recidivist violators, the fines incurred can be as high as \$300,000 for each violation.

⁶ The Department of Labor likewise has informed us that it frequently obtains prohibitory injunctions to enforce the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, and that civil contempt fines have been assessed under prospective fine schedules to coerce compliance.

⁷ Petitioners' theory would also produce radical, and unwarranted, changes in the conduct of other routine litigation. A state court adjudicating a dispute between land owners A and B might order A to remove a tree as a nuisance, while ordering B not to interfere with A's enjoyment of a second tree. Under petitioner's view, the court can enforce the decree civilly by imprisoning A until he has the tree removed if he does not voluntarily comply. With respect to B's correlative obligation not to interfere with A's enjoyment of the second tree, however, petitioner's view would prevent the court, as a matter of federal constitutional law, from compelling compliance through a civil contempt sanction. The court's only recourse would be a criminal contempt prosecution. The Constitution does not compel such a bizarre result.

371 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)), "[t]he judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Shillitani*, 384 U.S. at 371 n.9; see also *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987). Petitioners' position stands that principle on its head, completely ruling out civil contempt fines in a case such as this and requiring a court, as a matter of federal constitutional compulsion, to resort to criminal contempt in the first instance in enforcing a decree.

3. In sum, petitioners' arguments fail to cast doubt on the correctness of the Supreme Court of Virginia's conclusion that the fines assessed against them were civil in nature. The conclusion reached by that court is in accord with the decisions of the federal courts of appeals that have held prospective fines for violation of prohibitory injunctions to be civil. See *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 532-533 (9th Cir. 1991); *New York State NOW v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1343 n.27 (3d Cir. 1976); *Shakman v. Democratic Organization*, 533 F.2d 344, 349 n.7 (7th Cir. 1976); see also *Roe v. Operation Rescue*, 919 F.2d 857, 869 (3d Cir. 1990).

B. Failure To Vacate Previously Imposed Fines Upon Settlement Of The Original Controversy Does Not Render The Proceeding Criminal In Nature

Petitioners contend (Br. 25-37) that the fines imposed in this case, whatever their initial character, must now be deemed criminal because the state courts refused to vacate them after petitioners settled their differences with the Companies. In petitioners' view, *Gompers* compels the conclusion that settlement of the underlying dispute requires vacatur of any civil contempt fines, lest they become (retroactively) "criminal." While federal policy may sometimes favor vacatur or reduction of such fines,

nothing in *Gompers* suggests that the criminal or civil nature of the fines under the Constitution turns on whether they are vacated upon settlement.

1. *Gompers* held that civil contempt proceedings in federal court are part of the "original cause" in which they arise. In *Gompers*, the complainant had moved for an order to show cause and for "such other and further relief as the nature of its case may require," 221 U.S. at 448, but the trial court had not actually awarded any relief in the proceedings to the extent they were civil in nature; it instead had ordered the defendants imprisoned for a fixed term, which this Court found to be a criminal sanction, and awarded the complainant its costs in connection with those criminal proceedings. *Id.* at 425. Moreover, "the only remedial relief possible [in the future] was a fine payable to the complainant," measured by the extent of its injury. 221 U.S. at 444, 451. Thus, "when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character" in civil contempt proceedings. *Id.* at 451-452. By its own terms, therefore, *Gompers* stands for the unremarkable proposition that a full settlement between the parties renders moot any pending claim for compensatory fines from the defendant. See *Krentler-Arnold Co.*, 284 U.S. at 453. That reading of *Gompers* is consistent with the fact that the Court had already refused on mootness grounds to entertain an appeal from the underlying injunction, 221 U.S. at 451, and with this Court's repeated references to *Gompers* as having been decided on mootness grounds. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *United Mine Workers*, 330 U.S. at 294; see also *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949, 955-957 & n.5 (9th Cir. 1980) (Kennedy, J.).

Especially in light of its narrow mootness rationale, *Gompers* does not assist petitioners. It is well settled that

"[t]he inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964)). It is equally well settled that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution." *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989). *Gompers* therefore would not have required the state courts to vacate the contempt fines on mootness grounds even if *Gompers* were analogous to the situation at bar.

2. In any event, *Gompers* is not analogous to this case, for three reasons. First, the trial court treated the Commonwealth and the two counties (which were affected by petitioners' violations of the injunction and were judgment creditors of petitioners under the contempt orders) as though they were parties whose failure to agree to the settlement distinguished this case from *Gompers*. Petitioners do not appear to challenge that ruling here.

Second, the contempt proceeding in this case was not primarily compensatory; it was primarily coercive. As the Supreme Court of Virginia correctly noted (Pet. App. 17a-18a), *Gompers* involved what would have been a purely compensatory use of civil contempt. This Court emphasized in *United Mine Workers* that when civil contempt is compensatory "the * * * fine is dependent upon the outcome of the basic controversy," but that "the court's discretion is otherwise exercised" when the contempt is coercive. 330 U.S. at 304. The Supreme Court of Virginia therefore did not err in concluding that *Gompers* did not require vacatur of the contempt fines in this case.

Third, as the district court pointed out in the parallel NLRB case, the civil contempt proceedings were still

pending in *Gompers*, and the trial court had not levied any civil contempt fines. *Clark*, 752 F. Supp. at 1300-1301. In this case (and the federal court case), by contrast, the relevant civil proceedings were completed, fines were actually assessed against petitioners, and those fines were reduced to separate, appealable judgments. Nothing in *Gompers* suggests that preexisting judgments of civil contempt must be vacated when the underlying civil action has been settled.

3. Petitioners' contrary view is based on two related propositions, neither of which is correct. The first is that civil contempt proceedings must necessarily benefit a private complainant, rather than the public at large or the government as their representative. Early cases did suggest that a contempt proceeding that benefitted the public or the government to any extent was necessarily criminal, *In re Christensen Engineering Co.*, 194 U.S. 458, 461 (1904); *FTC v. A. McLean & Son*, 94 F.2d 802, 804 (7th Cir. 1938), but this Court has since explicitly abandoned that view. *United Mine Workers*, 330 U.S. at 301-302 & n.79; *McCrone v. United States*, 307 U.S. 61, 63-65 & n.4 (1939).

The second proposition on which petitioners' argument rests is that any exaction that serves to vindicate the court's authority in any way must necessarily be criminal. See Pet. Br. 33. That argument is inconsistent with the well settled authority of courts to impose civil sanctions on litigants who abuse their processes. See, e.g., *Fed. R. Civ. P. 11*; *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (dismissal of antitrust suit for "bad faith" discovery violations); *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2132-2136 (1991) (federal court has inherent authority, analogous to contempt power, to order losing party to pay nearly \$1 million as sanction for bad faith conduct); see also *McComb v. Jacksonville Paper Co.*, 336 U.S. at 194-195. As the Court noted in *National Hockey League*, "here, as in other areas of the law, the most severe in the

spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 427 U.S. at 643. Thus, even if the fines imposed on petitioners are viewed as vindicating the authority of the state courts, that fact would not require that they be classified as "criminal" for present purposes.

In any event, irrespective of whether vindication of a court's authority, standing alone, would qualify as a non-punitive purpose that may properly be served in civil proceedings, the inquiry into the purpose served by contempt fines should not take place as of the time of settlement, but at the time when the trial court adopts the coercive fine schedules. The fines were remedial when the trial court announced them prospectively in order to safeguard the rights of the Companies and of the public, and petitioners' obligation to pay them became fixed when they thereafter disobeyed the court's orders and the court liquidated petitioners' liability by entering appropriate judgments of contempt. The later settlement of the underlying controversy could not retroactively change the character of petitioners' obligation, any more than such a settlement could retroactively turn a previously served imprisonment for civil contempt into the infliction of unconstitutional "punishment" for which petitioners might be entitled to compensation, cf. *Davis v. Passman*, 442 U.S. 228, 233-248 (1979); 42 U.S.C. 1983—or any more than a subsequent settlement would retroactively change the character of coercive fines already paid into the State's fisc, so as to require the State to disgorge them. In this area, as in others, "the moving finger writes; and, having writ, moves on." *United States v. Mechanik*, 475 U.S. 66, 71 (1986). Nothing in *Gompers*, or any other precedent of this Court, requires the conclusion that civil contempt sanctions, whether they be fines or imprisonment, must not only serve remedial ends when they are initially invoked, but must also be independently remedial at every point in time thereafter, in perpetuity.

C. Petitioners Have Not Shown That The Civil Contempt Fines Imposed In This Case Are Constitutionally Excessive As A Matter Of Law

Petitioners' final claim is that the fines imposed in this case are so large as to violate the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. This Court has held that certain exactions, while not "punishment" in the constitutional sense," *Bell v. Wolfish*, 441 U.S. at 537, may sufficiently serve retributive and deterrent values that due process imposes some limitations on their size, and requires special review of the procedures by which they are obtained. The principal example is punitive damages for tortious conduct. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991). The Court has also concluded that some civil forfeiture proceedings, while not punitive enough to require a jury trial or most other procedures mandated for criminal cases, see *Austin v. United States*, 113 S. Ct. 2801, 2804-2805 n.4 (1993), serve deterrent and retributive purposes that make application of the Excessive Fines Clause appropriate. *Id.* at 2806. Because the Court has often stated that civil contempt sanctions serve some punitive purposes, see, e.g., *Gompers*, 221 U.S. at 441, we assume that the Excessive Fines Clause and the due process protections applicable to punitive damage awards apply to civil contempt sanctions as well. As the case comes to this Court, however, the limited challenge raised by petitioners lacks merit.

1. In advancing their due process argument in the Supreme Court of Virginia, petitioners relied solely on a conclusory claim that the sheer amount of the total fines levied for their course of conduct "jar[red] the conscience." Brief for Appellant at 22, *UMW v. Clinchfield Coal Co.*, No. 92-0299; Brief of Appellees at 44, *Bagwell v. UMW*, No. 91-0634.⁸ They did not present the court

⁸ Petitioners filed two briefs in the Supreme Court of Virginia, one as appellees in respondent Bagwell's appeal from the decision of the Court of Appeals (which covered only a part the contempt fines), and another in their own appeal from the trial court's deci-

with any further arguments concerning the factors that might bear on the impermissibility of the fines, either singly or in the aggregate, or attempt to demonstrate by reference to the record that the fines were not sufficiently related to the advancement of legitimate state interests. Judicial review of monetary awards by trial and state appellate courts provides a primary safeguard against constitutional claims of excessiveness. See, e.g., *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plurality opinion); *id.* at 2727 (Scalia, J., concurring); *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045. In our view, the furnishing by a State of fair procedures for the review of such claims imposes a correlative obligation on litigants raising them to make some attempt to establish by reference to the record precisely *why* the monetary award is claimed to be excessive. As raised in the Virginia Supreme Court, petitioners' due process argument amounted to a contention that the mere size of the total award rendered the fines excessive as a matter of law under the Due Process Clause, irrespective of the facts of the particular case. The Virginia Supreme Court properly did not accept that "facial" challenge to the fines. Pet. App. 18a-19a.

Even in this Court, petitioners do not present the Court with any detailed argument in support of their claim that the fines violate the Due Process Clause. See Br. 37-38, 40. For this reason, we shall merely identify several pertinent considerations in the event the Court nevertheless chooses to address the issue in greater detail. First, although petitioners (Br. 38) fault the trial court for not calibrating the amount of the fines to the "harm caused" or "specific harms caused," it also would be relevant to consider the *potential* harm that petitioners' conduct might have caused. See *TXO*, 113 S. Ct. at 2721-2723 (plurality opinion). Second, although respondents suggest (Br.

sion on the balance of the fines (a case that the Supreme Court of Virginia certified and consolidated for argument with *Bagwell's* appeal).

38) that the only purpose of coercive fines in this setting is to "vindicate the trial court's authority and the 'rule of law' under the circumstances," such fines, as we have explained (see pages 12-17, *supra*), serve the important remedial purpose of protecting the rights of the complainant and third parties. Third, although petitioners note that the Supreme Court of Virginia relied in part on the extent of the Union's resources (albeit without identifying the amount, see Pet. App. 18a), they do not suggest that factor is irrelevant in establishing a schedule of coercive fines. Cf. *TXO*, 113 S. Ct. at 2722 n.28 (plurality opinion); *Pacific Mutual*, 111 S. Ct. at 1045. Finally, it is appropriate to consider the duration of the wrong and the degree of the defendant's fault. See *Pacific Mutual*, 111 S. Ct. at 1045; Pet. App. 19a.

2. In pressing their claim that the fines violate the Excessive Fines Clause, petitioners rely principally on *Austin*. That case, however, does not help petitioners, for two reasons. First, it does not appear that the Eighth Amendment claim was either pressed or passed upon below—and, accordingly, that petitioners preserved it for review.⁹ See, e.g., *TXO*, 113 S. Ct. at 2723-2724 (plural-

⁹ When a State's highest court fails to pass on a federal question, this Court will "assume[] that the omission was due to want of proper presentation * * *, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). Petitioners' argument based on the Eighth Amendment was even more limited than their due process contention. Neither of petitioners' briefs in the Virginia Supreme Court raised the Excessive Fines Clause of the Eighth Amendment under the "Questions Presented" for review. See Brief for Appellant at 4-5, *UMW v. Clinchfield Coal Co.*, No. 92-0299; Brief of Appellees at 7, *Bagwell v. UMW*, No. 91-0634. In addition, the entirety of petitioners' argument on the Eighth Amendment in both briefs was a single conclusory sentence without any citation of authority—which in one of the briefs appeared in a footnote—tacked onto the end of the due process argument: "By a parity of reasoning, the fines imposed are so unreasonably large as to violate the excessive fines clause of the Eighth Amendment." Brief for Appellant at 23 n.16, *UMW v. Clinchfield Coal Co.*, No. 92-0299; Brief of Appellees at 45,

ity opinion); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-80 (1988); cf. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-277 (1989). The proper presentation rule is especially important in this case, because the Court cannot reach the merits of petitioners' claim without deciding the logically antecedent question of whether the Excessive Fines Clause is binding on the States—a question left open by this Court in *Browning-Ferris*, 492 U.S. at 276 n.22. Second, to the extent petitioners preserved any Eighth Amendment claim, they limited its scope to that of their due process argument—in effect, that the fines, by virtue of the sheer amount, were barred by the Eighth Amendment as a matter of law. Because fines of the magnitude imposed here are not barred by the Eighth Amendment in all circumstances, that claim must fail on the merits as well.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted.

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SEPTEMBER 1993

Bagwell v. UMW, No. 91-0634. The Virginia courts do not appear to consider such a fleeting reference to be adequate to preserve an issue for review; indeed, even errors that are specifically assigned are waived if they are not briefed. See Va. Sup. Ct. R. 5:27; *Mueller v. Commonwealth*, 422 S.E.2d 380, 385 (Va. 1992), cert. denied, 113 S. Ct. 1880 (1993).

In The
Supreme Court of the
United States

Supreme Court, U.S.

FILED

AUG 06 1993

OFFICE OF THE CLERK

October Term, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,

Petitioners,

-against-

JOHN I. BAGWELL; CLINCHFIELD COAL CO.; and
SEA "B" MINING CO.,

Respondents.

*On Writ of Certiorari to
The Supreme Court of Virginia*

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of the AEF include representatives of business, labor and the general public.

It is the belief of AEF that the ability of labor and management to resolve disputes in an atmosphere of equality is vital to the strength of the economy of the United States. Unnecessary government interference upsets this balance and creates a risk of economic strife that weakens the American economy. The judicial process is a critical area for maintaining a free society, and the public interest is best served by a legal structure that permits, to the fullest extent, the resolution of disputes between employer and employees by collective bargaining, with a minimum of government interference, in the free pursuit of the negotiating process by both sides.

Where, as here, judicial interference becomes unwanted by either side in a labor dispute, and is not necessary to redress criminal behavior, such interference may actually inhibit negotiation between the parties and, as a result, be an impediment to ultimate resolution of the dispute. AEF is concerned that a determination adverse to the position of the petitioners in this matter will effectively sanction inappropriate government interference in the collective bargaining process.

STATEMENT OF THE CASE

Petitioners represent employees in the coal industry, including the businesses conducted by Clinchfield Coal Company and Sea "B" Mining Company (collectively, the "Companies") in the southeastern region of Virginia. On or about April 4, 1989, following the expiration of a collective bargaining agreement, petitioners commenced a strike in protest against alleged unfair labor practices by the Companies. On April 12, 1989, the Companies filed a verified bill of complaint against petitioners, seeking injunctive relief. This action was based upon an allegation that members of petitioners had been engaged in activities in violation of Virginia's "right to work" law. On April 13, 1989, following a civil evidentiary hearing, the Circuit Court of Russell County, Virginia, established picketing guidelines and enjoined petitioners and their members from engaging in certain activities deemed injurious to the Companies' operations.

In May 1989, on application by the Companies, alleging that petitioners' members had committed a variety of violations of the injunction, the circuit court conducted a hearing at which petitioners were directed to show cause why they should not be held in contempt. After the hearing, the Court found seventy-two separate violations of its injunction and imposed \$642,000 in contempt fines (\$424,000 of which were suspended, conditioned upon payment of the balance within a certain period of time),

payable to the Commonwealth of Virginia.¹ In addition, the court held that, in the event of any future violations of the court's injunction, fines would be levied at a rate of \$100,000 for each "violent" violation and \$20,000 for each "nonviolent" violation.

In June 1989, a second motion was made by the Companies to have petitioners held in contempt for alleged new violations of the injunction. Following a hearing, the circuit court held petitioners in contempt, and fines were imposed in the total amount of \$2,465,000, payable to the Commonwealth of Virginia. In addition, the court denominated the fines as "civil and coercive" in nature. In the same order, the court established a new fine schedule "for the purpose of coercing the defendants to comply with the court's injunctions."

During the period from July through December, 1989, each time on motion made by the Companies, the circuit court issued its third, fourth, fifth, sixth, seventh and eighth contempt orders. Following a hearing on the third contempt motion, the court asserted, *inter alia*, as follows:

[The court] find[s] that . . . [petitioners] and [their] members have engaged in acts of violence that are directly related to their picketing in this

¹ Although the circuit court originally denominated the contempt orders in which these fines were levied as "civil" in nature, the court later determined that all such orders had been punitive and, therefore, "criminal" in nature. As a result, the court vacated the orders on the ground that appellants had not been provided with appropriate constitutional safeguards.

labor dispute and that they have been characterized by mass picketing and blocking of rights of way, both public and private . . . and . . . have intimidated or attempted to intimidate by threats and by violence members of this community who are attempting to exercise their right to go to work and make a living under Virginia law.

* * *

This court's injunction is designed to keep the peace here in Virginia and to be sure that . . . the citizens of this state, in these communities, can live in peace, free from the acts of terror which have been committed upon this community.²

Nevertheless, the court informed petitioners that they were not entitled to the full constitutional protection afforded to an alleged contemnor in a criminal contempt proceeding, inasmuch as "these were civil proceedings."³

In total, the circuit court levied in excess of \$64,000,000 in fines against petitioners, substantially all of which were directed to be paid either to the Commonwealth of Virginia or to the

² *Bagwell v. International Union*, 244 Va. 463, 469, 423 S.E.2d 349, 353 (1992) (quoting from a holding by the lower court).

³ *International Union v. Clinchfield Coal Co.*, 12 Va. App. 123, ___, 402 S.E.2d 899, 901 (1991) (quoting from a holding by the lower court), *rev'd*, *Bagwell v. International Union*, 244 Va. 463, 423 S.E.2d 349 (1992).

Counties of Russell and Dickenson in Virginia. In all instances, petitioners timely objected to the fines on the ground that they were criminal, not civil, in nature and had been levied without petitioners' having been afforded a hearing conducted under proper constitutional safeguards.

On January 1, 1990, during the pendency of petitioners' consolidated appeals of the first five contempt orders to the Virginia Court of Appeals, the Companies and petitioners (with the assistance of a "super mediator" appointed by the United States Secretary of Labor) reached a full settlement of their labor dispute, specifically agreeing, *inter alia*, that the parties would dismiss all pending litigation and have vacated all outstanding civil judgments, including contempt fines. On January 24, 1990, a joint motion to vacate all uncollected contempt fines was, in fact, made. However, although the circuit court agreed to vacate those contempt fines payable to the Companies, the court refused to vacate the approximately \$52,000,000 in unpaid fines payable to the Commonwealth of Virginia and the Counties of Russell and Dickenson.⁴

The Companies played no part in, and took no position regarding, petitioners' appeal of the first five contempt orders, which was argued in October 1990. Although respondent was not permitted to intervene as a party on that appeal, he was granted leave to submit an *amicus curiae* brief. In *International Union v.*

⁴ As a result of the circuit court's dismissal of the underlying civil litigation, there was no longer a procedural mechanism in place for collection of these fines. Accordingly, the court appointed respondent, John L. Bagwell, as "special commissioner" charged with defending and collecting those fines.

Clinchfield Coal Co., supra, the Court of Appeals of Virginia rejected petitioners' contention that the contempt orders had been "criminal," not "civil," in nature. Nevertheless, the court reversed the lower court's decision and vacated the contempt fines, agreeing with petitioners' argument that settlement of the underlying litigation also settled every proceeding that was part of that litigation. *See id.* at ___, 402 S.E.2d at 905 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911) ("[w]hen the main case is settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled, of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings"))).

Thereafter, respondent's motion for leave to appeal the Court of Appeals' decision with respect to the first five contempt orders to the Supreme Court of Virginia was granted. The Supreme Court also certified and consolidated with that appeal petitioners' appeal from the sixth, seventh and eighth contempt orders. In *Bagwell v. International Union, supra*, the Court reversed the decision of the Court of Appeals, holding that (i) respondent should have been granted leave to intervene as a party, and (ii) the contempt fines should not have been vacated because they had not been rendered moot by the settlement of the underlying litigation. As a result, the Court upheld the fines, which it found to be "civil," rather than "criminal," in nature.

SUMMARY OF ARGUMENT

Although the \$52 million in fines that had been levied against petitioners were payable to the Commonwealth of Virginia and the Counties of Russell and Dickenson, the lower court denominated those as "civil" and "coercive" in nature

because they were assessed only after petitioners had been found (following civil evidentiary hearings) to have violated the terms of injunction orders that contained schedules of prospective fines that would be set in the event of any future violations. Concededly, there was a "coercive" aspect to the orders establishing these schedules. However, the later orders, which actually made the contempt findings and imposed the fines, were not coercive; they were punitive in that they were designed to punish petitioners for violations of the injunctions that were found to have been committed by petitioners' members. As a further demonstration of the essentially punitive nature of these fines, the Supreme Court of Virginia held that, notwithstanding the joint motion by both sides in the labor dispute to vacate all civil contempt fines, the \$52 million of unpaid fines were properly continued against petitioners to maintain "the dignity of the law and public respect for the judiciary." *Bagwell, supra* at 478, 423 S.E.2d at 358.

Although multiple issues have been raised by petitioners on this appeal, *amicus* addresses only whether the Supreme Court of Virginia improperly upheld what, in reality, were criminal contempt fines in violation of petitioners' constitutional protections. It is respectfully submitted that a sovereign may not take an application by a private litigant for civil relief and convert it into a *de facto* criminal proceeding by the state, without affording the alleged contemnors the constitutionally required due process that attaches to such a proceeding.

ARGUMENT

Contempt of court is the Proteus of the legal world, assuming an almost infinite diversity of forms.⁵

This Court has never suggested that the distinction between civil contempt and criminal contempt is easily performed in all cases. However, the Court has repeatedly acknowledged that the distinction is a vitally important one because it determines what procedure governs adjudication of the contempt. *See, e.g., Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988); *Bloom v. Illinois*, 391 U.S. 194, 201-02 (1968). Selection of the appropriate procedure is necessary because of the additional safeguards that are constitutionally mandated in the context of a criminal contempt hearing:

The burden of proof is on the prosecution, the party charged cannot be required to testify against himself, cannot be put in double jeopardy, and cannot be tried without appropriate notice of the charge. Inferentially at least, he is entitled to counsel and compulsory process for bringing in his witnesses. He is now entitled to a jury trial if the criminal sentence is a potentially serious one. As with other crimes, intent is an element of criminal contempt, and it must be proven before criminal punishment can be inflicted The classification of a contempt hearing as a criminal one may also

⁵ Moskowitz, *Contempt of Injunctions, Criminal and Civil*, 43 COLUM. L. REV. 780, 780 (1943).

affect the right of appeal or the route that an appeal takes. At least in some criminal contempt cases, the state should be a party to any appeal proceedings. The criminal classification will also invoke the pardoning power of the state

Dobbs, *Contempt of Court; A Survey*, 56 CORN. L. REV. 183, 242-43 (1971).

In *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), this Court provided the following oft-quoted justification for distinguishing between civil and criminal contempt:

The distinction between refusing to do an act commanded, remedied by imprisonment until the party performs the required act; and doing an act forbidden, punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the [civil or criminal] character of the punishment.

Id. at 443. This justification was reaffirmed in the context of fines, rather than imprisonment, in *Hicks, supra*, where this Court articulated the following standard:

If the relief provided is a fine, it is remedial when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on some one who has not been afforded the protections

that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt.

488 U.S. at 632.

Nevertheless, this Court also recognized that "the 'civil' and 'criminal' labels of the law have become increasingly blurred." *Id.* at 631. "In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order." *Id.* at 635. However, where vindication of its own authority becomes the primary goal of the court, the sanctions are, by definition, more punitive in nature and, therefore, more in the nature of criminal contempt.

The definitive statement of what sanctions are available for civil contempt comes from this Court's decision in *United States v. United Mine Workers*, 330 U.S. 258 (1947). "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sanctioned." *Id.* at 303-04.

At bar, the trial court, the Court of Appeals of Virginia, and the Supreme Court of Virginia each went out its way to characterize the fines at issue as "coercive," thereby providing justification for the civil nature of the hearings that resulted in findings that petitioners had violated certain injunctions. *Amicus*

does not question that the trial court's original establishment of a prospective fine schedule was designed to be coercive in nature. However, the orders made *after* civil contempt hearings were conducted, in which petitioners were found to have violated the injunctions and in which fines were levied, were not coercive; they were punitive and related only to past behavior. It is on this point that the reasoning of the lower courts breaks down. For example, the Supreme Court of Virginia held:

When a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control over his own destiny. The same is true of the court's orders in the present case.

Bagwell, supra at 477, 423 S.E.2d at 357. But, petitioners were *not* ordered to perform an affirmative act. The injunction order that petitioners were found to have violated was prohibitory, not mandatory, in nature.

Certainly, a mandatory injunction requiring the performance of some affirmative act may contain a prospective fine in the event of nonperformance. That prospective fine is civil in nature because it is designed to coerce performance of the affirmative act, thereby recalling the admonition by this Court that "[o]ne who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid a penalty. And those who are imprisoned until they obey the order, 'carry the keys to their prison in their own pockets.'" *Penfield Co. v. S.E.C.*, 330 U.S.

585, 590 (1947) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).⁶

All prohibitory injunctions contain the implied threat of contempt in the event that an act is committed in violation of the order. (Indeed, without such an implied threat, the injunction would be of little value.) Sanctions imposed as a result of a finding of such contempt may be "compensatory" or they may be "punitive," but they cannot logically be characterized as coercive. The fact that the prohibitory injunctions at issue in this case made the threat of contempt *express*, by setting forth a prospective schedule of fines that would be levied in the event of a violation, does not change the underlying nature of the contempt. As such, the sanctions imposed (which were concededly not compensatory) should not have been converted from their essentially criminal nature.

Of course, courts may seek both to punish a contemnor for past violations of a court order and to coerce the contemnor into avoiding any future violations. (This may be especially true in the context of labor disputes, where the large numbers of individuals involved and the public nature of the defiance of an order may transfer the conduct in question from the realm of a private civil contempt into a perceived public disrespect for the authority of the court.) Nevertheless, it is fundamental that civil contempt relates to the rights of plaintiffs, and criminal contempt

⁶ Cf. *Gompers*, *supra* at 442 ("if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done or afford any compensation for the pecuniary injury caused by the disobedience").

relates to the judge's notion that defendant's behavior in failing to comply with a court order was so offensive and flagrant as to border on the criminal.⁷ Thus, where (as here) "a fine is ordered paid to the state, the judgment is punitive and the proceeding is considered one for criminal contempt." *Moskovitz*, *supra* at 790 (citing *In re Merchants' Stock & Grain Co.*, 223 U.S. 639 (1912); *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935)).

Amicus does not suggest here that the conduct of which petitioners' members were accused of having committed was justified or excusable. Whether petitioners or their members violated the trial court's injunction is not at issue. However, if the trial court truly believed that contempt fines were necessary and appropriate to maintain "the dignity of the law and public respect for the judiciary," *Bagwell*, *supra* at 478, 423 S.E.2d at 358, the correct vehicle should have been a criminal contempt hearing, at which petitioners would have been afforded the myriad of constitutional safeguards that are unique to such proceedings.

Furthermore, by characterizing the proceedings as "civil" in nature, designed to "coerce" certain conduct on the part of petitioners, the lower courts plainly intended to keep this dispute in the civil arena. It was, therefore, disingenuous for the Supreme Court of Virginia to vacate the Court of Appeals' order granting the joint motion of the litigants to vacate the contempt

⁷ Certainly, this notion was behind the apparent acceptance by the Supreme Court of Virginia of the trial court's characterization of the conduct of petitioners' members as "acts of terror which have been committed upon this community." *Bagwell*, *supra* at 469, 423 S.E.2d at 353.

finer. Either these fines should have been characterized as "criminal" in nature, in which case they should be vacated because they were levied under procedural safeguards that fell below those constitutionally mandated, or, if they truly were "civil" in nature, they should be vacated because they were settled by the underlying settlement of the litigation. The lower courts cannot have it both ways. By characterizing the punitive and public sanctions that were levied against petitioners as "coercive"--thereby avoiding the prerequisites of criminal contempt proceedings--but then refusing to allow petitioners and the Companies to resolve those sanctions privately (in the context of their civil settlement), the lower courts acted inconsistently with a fundamental tenet of American labor law that the government should foster employee organization and promote equity in bargaining between employers and employees.⁸

⁸ For example, the findings and policies set forth in the National Labor Relations Act provide, in pertinent part:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices

Even given the apparent consideration by the Supreme Court of Virginia of petitioners' purportedly "vast financial resources," *id.* at 480, 423 S.E.2d at 359, the extremely large size of the fines imposed--an aggregate of \$52 million--obviously had to have an impact on petitioners' posture in the settlement negotiations. Indeed, there is much in the facts that suggests that a desire to avoid the massive civil fines obtained by the employer may have contributed to the ultimate settlement of the labor dispute. Had petitioners not believed that their settlement agreement with the Companies would be realized in every respect, including the vacatur of all outstanding contempt fines, petitioners may, understandably, have reconsidered the settlement, thereby prolonging the strike.⁹

fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1973); see also *NLRB v. Jones & Laughline Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

⁹ Moreover, even if enforcement of the fines reinstated by the Supreme Court of Virginia will not undo the settlement agreement reached between petitioners and the Companies, it will surely exacerbate the tensions between the two sides during the collective bargaining process that begins once that agreement expires. Therefore, the holding by the Supreme Court of Virginia that settlement of a labor dispute may not resolve all outstanding civil contempt sanctions will, necessarily, have a chilling effect on future settlement negotiations between labor and management.

Therefore, what the Supreme Court of Virginia has done is constitutionally offensive and represents a distinctly "big brother" approach to the collective bargaining process. After all, it was the Companies that had originally moved in the trial court to have petitioners held in contempt; therefore, the Companies should be permitted to control the destiny of the resulting contempt proceedings (even after sanctions were imposed). It is no more than an indulgence in judicial activism for the trial court to have essentially become a third party in a civil litigation that private parties wished to abandon and to have converted that litigation into an action by the sovereign against private citizens. Under the guise of pursuing a civil contempt, the Supreme Court of Virginia permitted the imposition of massive punishment by the sovereign, which should have been restricted to the realm of a criminal contempt proceeding, with the corresponding due process safeguards that are constitutionally mandated.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be reversed, and all outstanding contempt fines against petitioners should be vacated.

Respectfully submitted,

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No. 92-1625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHN L. BAGWELL; CLINCHFIELD COAL CO.;
and SEA "B" MINING CO.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY,
INC. AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENT JOHN L. BAGWELL

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INTERNATIONAL UNION,
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Respondents.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE*
OF THE CENTER ON NATIONAL LABOR POLICY, INC.
IN SUPPORT OF RESPONDENT JOHN L. BAGWELL

INTRODUCTION

Pursuant to Supreme Court Rule 37.3, the Center on National Labor Policy, Inc. ("CNLP") submits this brief *amicus curiae* in support of ~~petitioners~~^{respondent}. All parties have given written consent to its filing.

INTEREST OF THE *AMICUS CURIAE*

The Center on National Labor Policy, Inc. ("Center" or "CNLP") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before the Court, including, *Riesbeck Food Markets, Inc. v. UFCW, Local 23*, No. 91-15; *Lehnert v. Ferris Faculty Assn.*, No. 89-1217; *Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council*, No. 80-1257; and *New York Telephone Co. v. N.Y.S. Dept. of Labor*, No. 77-961.

The parties to the instant case are primarily focusing on important constitutional and judicial review aspects of civil/criminal contempt under the Fifth and Fourteenth Amendments. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Supreme Court of Virginia — that certain enumerated public policy interests articulated by inferior state and federal courts have caused a divergence in the application of the civil and criminal contempt standards imposed by this Court.

The CNLP's primary interest in presenting the public interest where pressure groups attempt to affect the national good through illegality, is at stake here. However, beyond the narrow issues appearing in the CNLP's mandate, CNLP has an interest in the integrity of the courts and in lawful and peaceful societal behavior that is directly challenged by the Petitioners' efforts to avoid liability for the civil fines imposed by the courts below.

The issues in this case relate directly to the goals of the Center. Throughout the length of the strike against Clinchfield Coal Co. and Sea "B" Mining Co., ("the Pittston Coal Group," or "Pittston"), the Petitioners ("union" or "UMWA"), engaged in a campaign of terror against Pittston and the community in order to coerce, intimidate, and terrorize the Plaintiffs and the community into acquiescence to the demands of the UMWA.

The CNLP does not doubt that Petitioner will fully argue its interests here. However, because the interest of Petitioner in avoiding liability on the basis of procedural protections and upon the settlement agreement between it and Pittston, are without intimation of responsibility for violence in Southwest Virginia, the Petitioner's arguments are suspect. Clearly, the unions had full legal notice of the contempt orders processed against them before the state judge, but chose to ignore those orders. This they did at their own peril.

Likewise, the CNLP does not doubt that Respondent John L. Bagwell will fully argue his interests — e.g., those of the Commonwealth of Virginia — in this case. However, because his interest is in collecting the fines and vindicating the integrity of the Virginia courts, his arguments will naturally focus upon those issues, rather than upon the broader public interest in public safety in the face of violence perpetrated on a massive scale by a radicalized labor union.

The CNLP respectfully submits that it is in a unique position to fully advocate the rights of the public and those individuals who have suffered from the actions of Petitioners, and those who were precluded from pursuing their livelihood based upon the decisions of private parties of which they are not a part.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

QUESTION PRESENTED

Whether liquidation of coercive fines against civil contemnors who have failed to purge their contempt, ordered in the absence of the constitutional requirements for a criminal contempt proceeding, violates the Due Process Clause of the Fifth and Fourteenth Amendments?

STATEMENT OF THE CASE

This case arises on a Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia, 244 Va. 463, 463 S.E.2d 349 (1992), from that court's reversal of a decision by the Court of Appeals of Virginia vacating civil contempt fines imposed by the Circuit Court of Russell County against the UMW. 12 Va. App. 123, 402 S.E.2d 899 (1991). The Circuit Court found those fines to be liquidated because of the violation by Petitioners of several injunctions imposed by the Circuit Court to preserve public order and Petitioners' failure to purge themselves of their contempt. *Amicus curiae* adopts the further statement of the case set out in Respondent John L. Bagwell's Brief.

STATEMENT OF FACTS

The facts of this case are set out by Respondent John L. Bagwell, Special Commissioner, in his brief and are adopted here. *Amicus curiae* also points out the following specific legal findings of the Circuit Court of Russell County of August 22, 1990, in support of its ruling:

1. That the "evidence presented by the plaintiffs as to each of the allegations of contemptuous behavior proves without question that the International UMW was the author of these actions." Pet. App. 40a.

2. "The Court early on announced its purpose in imposing prospective civil fines the payment of which would only be required if it were shown the defendants disobeyed the Court's orders. That purpose was to compel compliance with the Court's orders which were entered to protect the rights of the plaintiffs and the public." Pet. App. 40a.

3. "The Court granted much of the relief requested finding the defendants were interfering with the rights of the plaintiffs and those of the general public." Pet. App. 44a (emphasis in original).

4. "[W]ith the passage of time....[t]he focus and loci of defendants' unlawful conduct shifted from company property and facilities to the public highways and private homes and businesses. So, as the strike proceeded, the protection sought from and granted by the Court was more and more for the general public." Pet. App. 44a.

5. "Where, as here, the public's welfare is so intimately involved and the Court has granted civil contempt relief payable in effect to the public, and where judgment has been announced and entered, the public's interest must be considered." Pet. App. 47a.

6. With regard to the Respondents' request to purge its civil contempt with community service, the Circuit Court found "if ever a party has come to the bar seeking equity with unclean hands, the defendants in the case have....The International, U.M.W.A. remains defiant and deserves no relief." Pet. App. 47a.

SUMMARY OF ARGUMENT

This Court has had repeated opportunities to characterize civil and criminal contempts based upon the factual situations in which they arise. In the instant case, Petitioners were adjudged to be in civil contempt of eight lawful court orders. These orders provided a prospective fine schedule in order to persuade the Petitioner unions to forsake violence upon the employer and the public as a tool to gain what they could not obtain peacefully at the bargaining table with their employers.

In *Hicks v. Feiock*, 485 U.S. 624 (1988), *United States v. United Mine Workers of America*, 330 U.S. 258 (1947), and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), this Court set out the range of situations wherein civil contempt sanctions may lie. The state and federal courts have understood these precedents to mean that when a court adjudicates a party for contempt for the purpose of punishing a party for actions or behavior set out in prior court orders and these being punitive sanctions, the order is criminal contempt. When the contempt results from violation of a lawful court order that requires affirma-

tive acts or non-acts, upon which the sanction can clearly be avoided, then the party holds the "keys of prison in [his] own pockets," and this is civil contempt. *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).

In the courts below, Petitioners, as parties, had in hand written injunctive orders and were represented by multiple counsel. See Pct. App. 55a, 61a, 64a, 71a, 83a, 97a, 102a, 109a, 113a, 118a. They were ordered to pursue non-violent courses of action and ordered to take affirmative steps to prevent violence in the coalfields and report the same to the court. Rather, like every past strike in the last seventy years, the UMWA has acted above the law and flaunted an attitude of dual contempt for police authority and compliance with the peaceful statutory scheme of labor relations envisioned by Congress in the National Labor Relations Act.

Moreover, the labor relations caselaw shows that a settlement of an underlying dispute between prospective collective bargaining partners, does not cause liquidated contempt orders to evaporate. The law is clear, inchoate and pending contempt citations fall with settlement of the underlying case; final contempt orders are enforceable. This is nowhere demonstrated in Petitioners' Brief on the Merits, although they promised to display such diversity in the Second Question Presented for Review to this Court and which was granted review by this Court. For this reason alone, Question Two was improvidently granted and should be dismissed.

Consequently, *amicus curiae*, respectfully shows that the matters adjudicated by the Virginia courts against the UMWA was in pursuance of civil contempt remedies. Nowhere along the long highway of over eight injunctions did the Petitioners ever seek to comply with the state court's injunctions or to purge themselves of contempt. The failure to comply and purge, "hallmark" indicators in matters of civil contempt, were not sought by the Petitioners.

Therefore, this Court must find that the Virginia courts acted properly in exercising lawful and appropriate police power in attempting to restrain Petitioners unprotected acts under federal and state labor laws. These same actions undeniably caused serious

bodily and property injuries to many individuals and, in the past, have resulted in deaths too numerable to count. If stripped of authority to immediately act to protect the sanctity of their orders and to compel obedience, the entire scheme of labor relations authority envisioned by Congress will be undermined.

ARGUMENT

I. CIVIL CONTEMPT IS AN INHERENT REMEDY ALWAYS AVAILABLE TO THE COURT AND THAT CAN BE EMPLOYED BY THE COURT TO COERCE FUTURE COMPLIANCE WITH ITS ORDERS

American jurisprudence has long ~~been~~ recognized the judicial remedy of contempt. The aim of civil contempt is to coerce a defendant into compliance with a court order and to compensate the complainant for losses. In this way, civil contempt intends to compel compliance with court orders, enforce private rights, and to administer remedies. It preserves the powers and vindicates the dignity of the court. *Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1079 (1992) ("civil contempt is designed to coerce compliance with the court's decree"); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 443 (1986) (\$150,000.00 fund established "to secure compliance" with "earlier orders" was civil contempt).

The contingent nature of the sanction is the "hallmark" distinction between civil and criminal contempts. *IBM v. United States*, 493 F.2d 112, 115 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974) (\$150,000.00 fine per day found sufficient to coerce compliance). Where the power imposed exacts penalties "to punish petitioners for their contemptuous conduct," *Local 28, Sheet Metal Workers*, 478 U.S. at 444, the order is of criminal contempt; those prosecuted to preserve and enforce the rights of private parties are civil, remedial, and coercive. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988) ("the critical features are...for civil contempt the punishment is remedial, and for the benefit of the complainant. But if for criminal contempt the sentence is punitive, to vindicate the authority of the court."). While distinctions between civil and

criminal contempt are sometimes difficult to discern,¹ the primary nature of the remedy remains — contempt is the power by which the court enforces its will.²

Moreover, in civil contempt situations, once the condemnor ceases to defy the court and orders his behavior in compliance with the court order, the contempt ceases. In criminal contempt, that power is out of the hands of the condemnor; it cannot be purged. *Ochoa v. United States*, 819 F.2d 366 (2d Cir. 1987).³

In the above-styled case, Pittston invoked the judicial power of the trial court to curtail the potentially explosive nature of the

¹ This Court recognized this difficulty in its landmark decision upholding an award of contempt against one of the parties to the instant action — the UMWA: It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.

United States v. United Mine Workers of Am., 330 U.S. 258, 299 n.70, citing *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904).

² An important measure of appellate court deference is in their response to challenges to trial court determinations of contempt which may be or are based upon orders which are later reversed:

the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law.

Nicholas v. Commonwealth, 186 Va. 315, 42 S.E.2d 306 (1947), citing with approval *Freeman on Judgments* 5th ed. § 357, p. 744. Such orders are lawful within the meaning of contempt statutes until reversed by an appellate court. *United States v. UMWA*, *id.*, at 293.

³ Another recognized distinction in criminal contempt is whether the penalty for noncompliance is a debt/fine to be paid to the court or imprisonment; for civil contempt, whether the punishment is remedial for the benefit of the complainant, *Hicks*, 485 U.S. at 632, or issued to affect significant public interests. See *Baltimore City Dep't of Social Servs. v. Bouknight*, 488 U.S. 1301, 1305 (1988) (to obtain production of a child is civil contempt) (Rehnquist, C.J.; Circuit Justice) (Motion for Stay of Judgment); *Baltimore City Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 900, 905 (1990) ("the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws.").

outstanding issues between the parties.⁴ Federal labor policy favors the maintenance of industrial peace. The Congress has, wisely or not, adopted for this purpose the mechanism of collective bargaining. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Inherent in the creation of a mechanism for collective bargaining through the National Labor Relations Act, 29 U.S.C.A. § 141, *et seq.*, is the private resolution of disputes through voluntary agreements, both in the interests of judicial economy and to allow the unimpeded functioning of the free market. *West Rock Lodge No. 2120, IMAW, AFL-CIO v. Geometric Tool Co.*, 406 F.2d 284, 286 (2d Cir. 1968); *Barbour ex rel. NLRB v. General Service Emp. Union Local No. 73*, 453 F.Supp. 694, 698 (N.D. Ill. 1978). Pittston requested the protection of the trial court from the UMWA which was replicating its long history of violence in the coal fields of the United States in labor disputes.⁵

⁴ Federal legislation preempts a great deal of state court jurisdiction to hear issues of labor disputes. But though the Federal government dominates the field of labor law, there is no blanket preemption of state court action. This Court has specifically held that states may act to preserve:

interests so deeply rooted in local feelings and responsibility that, in the absence of compelling congressional direction, [the court] cannot infer that Congress ha[s] deprived the States of the power to act.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 188, n. 13, 98 S.Ct. 1745 (1978), citing *Farmer v. Carpenters*, 430 U.S. 290, 296-97, 97 S. Ct. 1056, 51 L.Ed. 2d 338 (1977). The injunctions entered herein are based upon Virginia's Right to Work law. Va. Code. Ann. § 40.1-58 *et seq.* (Michie 1950).

⁵ See Thieblot and Haggard, *Union Violence: The Record and Response by Courts, Legislatures, and the NLRB*, pp. 79-118, Labor Relations and Public Policy Series, No. 25, The Wharton School-University of Pennsylvania [hereinafter "Thieblot & Haggard"], for a narrative regarding the long history of union violence in the coal fields. Thieblot & Haggard document the long history of unlawful means used by the UMWA in seeking economic goals. Particularly relevant to the above-styled action are the roving caravans appearing in the 1977-78 strike (p. 101), mass picketing its campaign of intimidation in pursuit of recognition [p. 84, citing *UMWA District 2, et al. v. Mercury Mining & Constr. Corp.*, 96 N.L.R.B. 1389 (1951)], the intimidation of nonunion, nonstriking coal company workers [p. 85, *Blue Ridge Coal Corp. v. UMWA*, 129 N.L.R.B. 146, 159 (1960)], destruction of state police property, and in efforts by judicial authorities to prevent

(continued...)

Nonetheless, Pittston invoked the inherent powers of the trial court in seeking injunctive relief against the Petitioners International Union, UMWA, District 28, UMWA, numerous locals, and certain individual union officials.⁶ Pursuant to the injunctive relief rendered by the trial court, the unions appeared on many occasions by Orders to Show Cause why they should not be held in civil contempt.

However, once the economic dispute between the parties was resolved, the Petitioners and Respondents Pittston Coal Group appeared before the trial court jointly requesting complete dismissal.⁷ If this Court reverses the decision of the Supreme Court

⁶(...continued)

actual "small wars" initiated by organized mine workers upon nonunion miners. *Prater v. UMWA*, 793 F.2d 1201 (11th Cir. 1986).

⁶ Petitioners previously challenged the jurisdiction of the Circuit Court to enter the orders underlying the contempt, based upon the theory of preemption by Federal labor law. This challenge is without rational basis, and was been rejected by the trial court and by the United States District Court for the Western District of Virginia on a Petition for Removal. The issue is *res judicata*.

⁷ The proposition that civil contempts must be dismissed upon settlement is at odds with the jurisprudence in Virginia. In *Carter v. Commonwealth*, 96 Va. 791, 32 S.E. 780 (1899), the Supreme Court of Virginia identified the right of a court to protect itself through contempt to be an inherent right directly vested from the Virginia Constitution. In fact the legislature has provided for this authority by statute, VA. Code §§ 18.2-456(1), (5). These provisions provide that:

The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases:

(1) Misbehavior in the presence of the Court, or so near thereto as to obstruct or interrupt the administration of justice;

(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court.

The Supreme Court of Virginia has interpreted the fifth provision to strictly apply to refusals to obey orders of the court. *Forbes v. State Council*, 107 Va. 853, 60 S.E. 81 (1908); *Laing v. Commonwealth*, 205 Va. 511, 137 S.E.2d 896 (1964). Reversal of the Supreme Court of Virginia's decision upholding the fines threatens the fabric of this authority.

of Virginia upholding the fines, this Court will have eviscerated completely the police powers of the states in labor disputes.

Clearly, in cases in federal and state courts nationwide, merely because an employer and labor union eventually enter a collective bargaining agreement, does not mean that violent and illegal union actions pursued to extort bargaining advantages, previously enjoined by a state court and adjudicated to be civil contempt, must be dismissed as the Petitioners argued in their second Question Presented in the Petition for Writ of Certiorari. In fact, the cases to the contrary are legion. Noticeably absent from the Brief on the Merits is any reference to the "conflict with numerous lower court decisions involving settlement agreements" the Question upon which this Court granted *certiorari* to review. Petition at 23. Without proper precedential authority, *amicus curiae* contends that the writ was improvidently granted on this Question and should now be dismissed.

For example, in *Spallone v. United States*, 493 U.S. 265, 110 S. Ct. 625 (1990), this Court upheld daily fines imposed by a district court to gain compliance with a consent judgment. There, the Court upheld increasing daily fines against the City of Yonkers, but not its individual city council members, as a means to coerce compliance with the district court's orders, even if it might bankrupt the city. *Id.* at 633. The Court observed that the equity court must have adequate "remedial powers" and "various methods by which to ensure compliance with its remedial orders." *Id.* at 632.

Further, in *Local 890, Int'l Union of Mine, Mill & Smelter Workers v. New Jersey Zinc Co.*, 58 N.M. 416, 272 P.2d 322 (1954), the Supreme Court of New Mexico held that an injunction issued to prevent further violence and mass picketing out of which civil contempt judgments had been entered, were not to be dissolved merely upon termination of the union's strike. The Court distinguished the factual situation of contempt citations adjudicated prior to settlement as enforceable with those contempts that had yet

to be adjudicated. See *New Jersey Zinc Co. v. Local 890, Int'l Union of Mine, Mill & Smelter Workers*, 57 N.M. 617 (1953).⁴

Similarly, in *LRC v. Fall River Educ. Ass'n*, 105 L.R.R.M. (BNA) 3157 (Mass. Sup. Ct. 1979), a union had engaged in an unlawful strike for two weeks in violation of a temporary restraining order. Despite the order, the strike continued and the court imposed daily fines upon the union. A collective bargaining agreement was then signed and the teachers went back to work. After that, the city and union sought to withdraw the case and reduce or revoke the fines. Moreover, the city waived any right to collect damages. The Massachusetts court refused to comply with this offer. In language ringing with the thoughts expressed by Judge McGlothlin (the Virginia trial court judge), the court found:

The School Committee has thus invoked the powers and sanctions of this court, used them as a bargaining tool, and then, having achieved its purpose, left the court and the Labor Relations Commission in the unenviable position of having to deal with the consequences of its abandoned court action.

105 L.R.R.M. (BNA) at 3160.

The court determined that the fines it had imposed were for civil contempt and the awards were to be for the benefit of the state or the school board to remedy their losses. The conundrum for a court in these circumstances was summed up very well:

The problem with the coercive, or *in terrorem* fine as it is sometimes called, is that it is not coercive at the time

⁴ In this prior appeal, the New Mexico Supreme Court dismissed the union's civil contempt proceedings arising out of a contempt citation that had been filed yet not acted upon. Finding *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), applicable, the Court concluded that a civil contempt proceeding in equity that provides remedial relief cannot be sustained after termination of the proceedings because there is no need for further equitable relief or judicial requirement to coerce compliance with the court's order.

it is collected. At the time it is imposed, the prospective coercive fine tends to motivate the contemnor to comply with the court's decree. At the time of collection, however, the defendant-contemnor has already purged himself of contempt by complying with the court's order. The fine, designed to have an effective threat, probably does not accurately reflect the complainant's damages and is therefore not remedial. The chameleonic characteristic of the coercive fine has not been discussed by the federal cases approving such fines. It can be analogized, however, to the suspended jail sentence for a definite term upheld in *Jencks v. Goforth*, 261 P.2d 655, 32 LRRM 2708 (1953).

105 L.R.R.M. (BNA) at 3162.

The court concluded that "it is the date the decree is entered, and not the date payment is enforced, that controls whether the sanction imposed is punitive or coercive." *Id.* The court affirmed its civil contempt findings and held that since its fines were prospective only, the union held the keys to its own release, and the fines were enforceable. "If this sanction is to be effective in the future, it must be enforced in the present case. The court is not merely vindicating its authority...but protecting the rights of complainants in future contempt actions and insuring an effective alternative to coercive imprisonment." *Id.* at 3162-63. See *Bhd. of Locomotive Firemen & Engrs. v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 582 (D.C. Cir. 1967) (prospective coercive fines enforceable despite reversal on appeal). *Amicus* concurs in these findings.

A similar result was reached in *School Dist. of Pittsburgh v. Pittsburgh Fed. of Teachers*, 96 L.R.R.M. (BNA) 2852 (Pa. Commw. Ct. 1977), *rev'd on other grds*, 486 Pa. 365 (1979), where the trial court had issued an injunction to protect the public health, safety and welfare and imposed a \$25,000 initial and succeeding \$10,000 fine per day upon the union for civil contempt. The union subsequently settled the strike. The court found the purpose of its civil contempt citation was to coerce prospective

compliance with the injunction and that the injunction was akin to a final adjudication on the merits of the complaint. Therefore, when the strike settled, the fines did not abate. See also *Board of Water Works v. Pueblo Water Empl. Local 1045*, 196 Co. 388 (Co. 1978) (civil contempt fines against union upheld for violating injunction); *Board of Educ. of Harford County v. Harford County Educ. Ass'n*, 94 L.R.R.M. (BNA) 2658 (Md. 1976) (contempt upheld where union official advocated that the union's continuance of the strike was to obtain a settlement with the employer, thereby achieving the court's very mandate).

In a non-settlement situation, termination of a union's enjoined actions was held not to warrant termination of the proceedings. In *International Ass'n of Firefighters, Local 526 v. Lexington-Fayette Urban County Government*, 95 L.R.R.M. (BNA) 2923 (Ky. 1977), the Kentucky Supreme Court upheld a civil contempt fine arising out of a refusal by the union to abide by a restraining order in holding a ten-day strike. The Court affirmed that the union was guilty of civil contempt although the union was back to work at the time. The federal courts in these situations also impose no restriction on enforcement of civil contempt fines after the recalcitrant party complies with an injunction. See *Clark v. International Union, UMWA*, 752 F. Supp. 1291, 1300 (W.D. Va. 1990).

In *Clark*, the federal district court acting in the same strike at issue in the case at bar, but with the National Labor Relations Board as plaintiff, also issued civil contempt fines against the union petitioners here. It rejected the unions' contentions that the court's prospective fines were criminal in nature and that the private settlement with Pittston made the fines "moot." 752 F. Supp. at 1300. That court correctly distinguished *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911), by showing that this Court held that:

where a court imposes *criminal* sanctions followed by settlement of the underlying dispute, no remand for *civil* contempt proceedings may take place in connection with the case. The *Gompers* Court did not have before it (as the court here does) civil contempt fines that were

imposed in proceedings prior to settlement of the underlying dispute.

Id (emphasis in original).⁹

Finally, in *Cincinnati v. Cincinnati Dist. Council 51*, 135 Ohio St. 197, 299 N.E.2d 686, 84 L.R.R.M. (BNA) 2241 (1973), cert. denied, 415 U.S. 994 (1974), the Supreme Court of Ohio affirmed that prospective contempt awards against a union can be enforced after the union returns to work.

Accordingly, this Court should affirm the Supreme Court of Virginia's decision. Contrary to Petitioners' assertions, the Supreme Court of Virginia's conclusion is consistent with the decisions of this Court and with the jurisprudence in other states.

II. THE CHANGED ECONOMIC RELATIONS PECULIAR TO THE PARTIES DO NOT JUSTIFY EVISCERATION OF THE TRIAL COURT'S EFFORT TO VINDICATE ITS AUTHORITY

Pittston's and the UMWA's agreement to terminate activity in violation of the trial court's order based upon the "settlement of the strike," rather than in compliance with the trial court's order, is a direct affront to the judiciary. Joint Motion, 1/24/90. This course of action is to the detriment of the community and the rule of law.¹⁰ While Pittston was certainly within its rights to waive its

⁹ Noticeably, the unions here did not file a notice of appeal to the United States Court of Appeals for the Fourth Circuit.

¹⁰ Respondents have asserted that the union leadership consistently preached the philosophy of non-violence in their actions during the strike. However, the unions failed utterly in their affirmative duty to report violations of the injunctions, as ordered by the trial court. No reports of violations came from them, although this affirmative act was ordered. Pet. App. 116a ¶ 13. The union did not cut off strike benefits to those participants participating in unlawful activity; it opposed efforts before the NLRB to have perpetrators of violence terminated by the
(continued...)

remedies under the trial court's ruling,¹¹ it is inappropriate that Petitioners should now seek to avoid their obligation to pay those amounts compensating the Commonwealth and its municipalities.¹²

The trial court made it clear in its August 22, 1990, Ruling that it required nothing more than respect for and adherence to the law of the Commonwealth when it prospectively set the fines herein. When Petitioners failed to comply, the trial court appropriately imposed and liquidated the fines.¹³ It was not merely the private interests of the parties that were at stake; also at stake was the very dignity of the trial court.

¹⁰(...continued)

affected coal companies. Instead, the union affirmatively supported those union members who violated the orders of the trial court.

The union also actively supported those members who broke the law. The Executive Board for District 28 offered the District's office building as security for bail bonds securing the release of those accused of crimes. This condonation and ratification of the illegal activity has been previously held to demonstrate union liability. *United Bhd. of Carpenters v. Humphreys*, 203 Va. 781, 127 S.E.2d 98 (1962), cert. denied, 371 U.S. 954 (1963). In *Prater*, 793 F.2d at 1210-11, the United States Court of Appeals for the Eleventh Circuit found the International UMWA's failure to issue orders to prevent violence, failure to repudiate a single act of violence, failure to investigate violence, and failure to discipline any union member for violence when under an obligation to do so, was evidence of ratification of those actions by its membership.

¹¹ Such rights certainly fall within the province of a party recompensed in a judgment for civil contempt. "[F]or civil contempt the punishment is remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911).

¹² "[I]f the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority." *Id.*, at 443, 31 S.Ct. at 498.

¹³ The union's did not evidence any will to enforce a publicly claimed philosophy of lawfulness, and in fact advocated a campaign of "civil disobedience." The unions attempt to equate non-violent lawfulness with civil disobedience. This is a false equation. Inherent in the practice of civil disobedience is the breaking of laws. While one may certainly practice civil disobedience and be non-violent, one is by definition a lawbreaker.

In this light, the essential element of federal jurisprudence applicable to review of civil contempt fines and relevant to the instant case, is that of purgation.¹⁴ However, the Petitioners fundamentally misconstrue this important point in their own Brief at 11, where they argue that "basic criminal procedure" must apply where "the contempt order: ... (3) structures the sanction so that the defendant, once he has acted, cannot thereafter purge the contempt." Hence, by their own admission, criminal contempt refuses to apply rules of purgation whereas civil contempt does.

Here, the trial court provided Petitioners with repeated opportunities to purge themselves of their contempt, which purgation could have been accomplished by complying with the trial court's orders and by actively working to prevent further acts of violence by its membership acting in pursuit of the unions' approved strike goals. Petitioners did not choose to do so. Neither Petitioners -- nor their partners in the Joint Motion -- are entitled to the relief which Petitioners now seek from this Court.

Furthermore, the fines do not take on the character of punitiveness since they were not "payable to the court" as the Petitioners repeatedly misstate. See Brief at 20. Rather, they were fully compensatory to the jurisdictions and taxpayers involuntarily entangled in the long throw of the unions' web of violence.

A. PRIVATE ECONOMIC RELATIONS, DESPITE ALLEGED "PUBLIC INTEREST" RAMIFICATIONS CANNOT SUPERSEDE THE RULE OF LAW AND PUBLIC SAFETY

The trial court of Virginia recognized that this dispute has cost the Commonwealth millions of dollars in added police protection

¹⁴ This is the stage at which the court offers the contemnor the opportunity to purge himself of the contempt. *OCAW, Int'l Union, AFL-CIO v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1976). Purgation is necessary to terminate a valid contempt order. *Windsor Power House Coal Co. v. District 6, UMWA*, 530 F.2d 312, 316 (4th Cir. 1976); *Carbon Fuel Co. v. UMWA*, 517 F.2d 1348, 1349 (4th Cir. 1975), citing *De Parq v. United States Court for the So. Dist.*, 235 F.2d 692, 699 (8th Cir. 1956).

to maintain the public peace and to prevent the destruction of private property through violent acts. Pet. App. 44a. Accordingly, that court ordered a certain portion of the civil contempt fines to accrue to the Commonwealth and local municipalities. These fines were appropriate recognition of and compensation to damaged parties.¹⁵

No matter the outcome of this case, the trial court faced continued contempt, both civil and actual,¹⁶ by the Petitioners, and if the decision of the Supreme Court of Virginia is reversed, every other trial court judge will be faced with a similar conundrum — risk expending limited judicial resources to protect the dignity of the judiciary and the public or not. Such equivocalty demeans the authority for all of the courts of this nation. It also removes one of the only effective weapons available to the courts to prevent the type of union-motivated terrorism of the type perpetrated in the coalfields of Southwest Virginia.

Reversal of the decision of the Supreme Court of Virginia would reduce the judiciary to mere weapons in private economic struggles spilling over into terrorization of the public at large. Once the private side of the conflict ends, the parties have finished consuming the court's time (and the judicial process to strengthen their strategic bargaining positions), "kissed and made up," the parties profess that the trial court's actions were inimicable to their interests and are subject to revision and derision. The parties' appearance arm in arm before the trial court below was nothing less than an absolute disregard for the adjudicative position of the equity court, motivated by nothing more than their private economic interests.

¹⁵ Insofar as the Court ordered compensation to the appropriate municipalities, it has fulfilled the remedial nature of civil contempt. *Major v. Orthopedic Equip. Co., Inc.*, 496 F.Supp. 604 (E.D. Va. 1980).

¹⁶ By actual contempt, *amicus* refers to the active disregard of the Court and its authority by the parties hereto. *Amicus* refers to the state of mind of the parties, not that which might appropriately be adjudicated by this Honorable Court.

That end is the gravamen of the Petitioners' offer here. The proposal offers no principled reason for the dismissal of the fines.¹⁷ The trial court initially imposed the fines as a coercive measure of enforcing the law, not only defending Pittston's rights, but stating to the community that it would be protected by vindication of the court's powers.

B. THE UNIONS' EFFORTS TO AVOID THE FINES CONFUSES COMMUNITY INTEREST WITH THE PARTIES' PAROCHIAL INTERESTS

As demonstrated above, Petitioners confuse their parochial economic interests with those of the community. Not only is this an inappropriate consideration in the instant context, it is incorrect.

The local community has an overriding interest in the rule of law, especially in the maintenance of pacific labor relationships. Said goal is not and has not been advanced by the Petitioners herein. As shown by Thieblot & Haggard, *infra*, Note 5, the history of the UMWA has been one of unmitigated violence. An individual appearing before a court on criminal charges for violence with the frequency with which Petitioners appear would have great difficulty in convincing that court that he should not suffer punishment for his misdeeds.

However, in the instant case, this Court faces no such problem. The fines imposed herein were civil, not criminal. They were remedial and coercive, not punitive. The simple truth is that they

¹⁷ Under analogous facts, the Sixth Circuit Court of Appeals found no disrespect in the Government's recommendation to reduce the level of a civil contempt fine, even though the District Court denied, and the Court of Appeals upheld, the motion to reduce the fine. *United States v. Work Wear Corp.*, 602 F.2d 110, 116 (1979). However, *amicus* would respectfully submit that no such "proper and commendable" action has occurred herein. In the matter presently pending before the Court, there has not even been a minimal showing of "just cause or ...mitigating circumstances." Failing that, dismissal of the fines imposed herein would "sanction mere lip service to [the Circuit Court's] Orders." 602 F.2d at 114.

were ineffective in coercing the Petitioners into the court-mandated course of action. Failing compliance — purgation of the initial contempt — Petitioners have not met the fundamental precondition to coming before any court and requesting dismissal of the fines herein. The terrorism only stopped when the unions' economic demands against Respondents Pittston Coal Group were satisfactorily resolved.

The trial court's active, specific mandate herein was insufficient to compel compliance in this case. An entire jurisprudence of failure to enforce fines against unions does little but support the thesis that enforcement is required to convince these unions, and others, that violence as an instrument of coercion is no more valid in labor relations than it is in domestic relations, or other personal, private relationships. Other courts have failed to make this message clear. This Court has a unique opportunity to do so.¹⁸

**C FAILURE TO ENFORCE THESE FINES WILL
HAVE A NEGATIVE IMPACT UPON THE
COMMUNITIES' INTEREST IN MAINTAIN-
ING PEACE IN LABOR DISPUTES**

Should the Supreme Court of Virginia's decision be reversed, the community will suffer a negative impact. As set forth previously, the judiciary's esteem in the community is immediately negatively impacted by retreat from the positions taken in imposing the contempt fines herein. Though likely within the discretion of a trial court, lacking adequate factual and legal basis for such a retreat, this Court would disserve itself and the entire judiciary by substituting its judgment on this issue for that of the Virginia trial court.

¹⁸ Perhaps the most amazing characteristic of union violence is the singular unwillingness of the courts to enforce their will. The analogy to the domestic violence situation is particularly appropriate. Were a spouse to engage in the conduct which unions have been found to do, particularly the UMW, not only would that conduct be grounds for divorce, said spouse would be subject to criminal prosecution. Employers may not divorce a certified union; a court may not put an association in jail. The only effective remedy against union violence is a fine; it is the only sanction applicable to a union.

The message that such action would send is clear. Pittston came before the trial court requesting relief from activities of the Petitioners that were illegitimate methods of coercion.¹⁹ The trial court took action because, *inter alia*, the actions of the Petitioners were disrupting the public and imposing great costs upon those who were, at best, only peripherally related to the conflicting issues. Once before the trial court, it was necessary to take action based upon the broader public interest in public peace. The court's goals should not now be sacrificed to the chimera of "labor peace," which in other contexts — as recognized by the trial court — is called extortion. The parties would now have the trial court, which courageously exercised its power during a time of strife in an effort to minimize the adverse impact of the parties' conflict on the community, forget that violent acts occurred, and that the mandate of the trial court was ignored. *Amicus* respectfully submits that this the Court should not do, and should therefore reject the Petitioners' instant efforts.

In ruling on the fines herein, the trial court clearly stated that its goal was to coerce the union into compliance with the outstanding orders, and to end the violence surrounding the dispute. Within the clear tradition of civil contempt, that court placed the "keys of [the union's] prison in their own pockets." *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).

In fact, the ends sought by the trial court were never achieved. In spite of the threat, and imposition, of tens of millions of dollars

¹⁹ Thieblot & Haggard cite eight purposes for union violence, five of which seem relevant to the instant dispute, viz.:

2. *As a bargaining device*, to cause personal or economic harm at costs that exceed the costs of settlement on the union's terms....
3. *As an attention getter*, to generate public and political pressure for a quick settlement....
4. *As an enforcement mechanism*, to insure solidarity among strikers....
6. *As a disruptive tactic*, to prevent nonunion companies from working during strikes....
8. *As a means of generating fear*, to create an "aura" for the meanness of the union, so as to condition future as well as current bargaining.

Thieblot & Haggard, p. 9 [italics in original].

in fines against the union, Petitioners never sought to end the cycle of lawlessness and violence surrounding the dispute. The goals in imposing the fines never having been achieved through the free will of the union and its membership, the condition for dismissal of the fines was not met. The Petitioners and their members made a conscious, knowing choice to disregard "what the law made it [their] duty to do." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947). Having done so, they should now pay the price.

CONCLUSION

There is little question that the Petitioners herein have serious disregard for the rule of law in general and for the power of the courts in particular. There simply is, and should be, no "union exception" to the normal principles governing the civil contempt powers of the courts of the nation.

WHEREFORE, for the reasons set forth above, the Center on National Labor Policy, Inc., respectfully requests that this Honorable Court affirm the decision of the Supreme Court of Virginia and affirm the full amount of the civil contempt fines imposed against the Petitioners.

Respectfully submitted,

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